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**How the U.S. Supreme Court Deemed the Workers' Compensation
Grand Bargain 'Adequate' Without Defining Adequacy**

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HOW THE U.S. SUPREME COURT DEEMED THE WORKERS' COMPENSATION GRAND BARGAIN "ADEQUATE" WITHOUT DEFINING ADEQUACY

I. INTRODUCTION

One of the chief issues in the workers' compensation legal regime is the adequacy of workers' compensation benefits.¹ Certainly, there are struggles over the costs to employers of providing workers' compensation insurance for the coverage of workplace injuries, but those costs have been going down.² Workplaces have in general become safer, which probably explains the decline.³ When one sees workers' compensation in the news these days, it is most often in connection with scandalous fraud or outrageous, if sometimes anecdotal, stories of undercompensation which generate allegations of unconstitutional benefit inadequacy.⁴ The workers' compensation "Grand Bargain" or quid pro quo—the exchange of common law tort rights to damages (and defenses) for statutory workers' compensation rights to benefits and tort immunity—was purportedly constitutionally premised on a notion of reasonable workers' compensation benefits.⁵ Implicit in the exchange was that some tort law beneficiaries (both defendants and plaintiffs) were giving up, ex ante, what would have matured into ascertainable tort damages (or defenses).⁶ Other workers' compensation statutory beneficiaries would receive windfalls as the victims of pure accident (claimants) or as the perpetrators of negligent harms (employers). Nevertheless, the question of benefit adequacy is important to those directly impacted by injury and can assume heightened societal importance whenever it is proposed that workers' compensation principles be exported to other legal environments – for example, to the medical malpractice tort regime.⁷

¹ For an entertaining introductory podcast see Alan S. Pierce, *Are Workers' Comp Benefits Adequate?*, Workers Comp Matters, Legal Talk Network (Peter Rousmaniere – Guest) available at <https://legaltalknetwork.com/podcasts/workers-comp-matters/2017/02/workers-comp-benefits-adequate/>

² Employer costs have fluctuated, rising during the Great Recession but then recently declining to historically low levels. See WORKERS' COMPENSATION: BENEFITS, COVERAGE, AND COSTS, NATIONAL ACADEMY OF SOCIAL INSURANCE available at <https://www.nasi.org/research/2017/report-workers%E2%80%99-compensation-benefits-coverage-costs-%E2%80%93-2015>.

³ See Louise Esola, *Comp Rates Set to Continue Downward Trend in 2018*, BUSINESS INSURANCE, October 11, 2017 available at <https://www.businessinsurance.com/article/20171011/NEWS08/912316461/Workers-compensation-rates-set-to-continue-downward-trend-in-2018>. The reader will note the discrepancy between falling carrier rates and rising employer costs. A full discussion of the phenomenon is beyond the scope of this article but has very interesting implications for the future of workers' compensation.

⁴ See Michael Grabell and Howard Berkes, *The Demolition of Workers' Comp*, PROPUBLICA, March 4, 2015 available at <https://www.propublica.org/article/the-demolition-of-workers-compensation> (highlighting benefit inadequacy through statistics and case studies). There are exceptions, however. See Michael Grabell and Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp*, PROPUBLICA, Oct. 14, 2015 available at <https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp> (featuring corporate attempts to eliminate statutory requirements to provide workers' compensation benefits).

⁵ See *infra*. at Part II.

⁶ This problem was dealt with in a view very early compensation statutes by allowing an employee to elect a negligence action where an injury had obviously resulted from an employer's *personal* negligence. See e.g. Sec. 2 of the original Kansas Workers' Compensation Act, L. 1911, C.000; but was very quickly dispensed with as statutes continued to be enacted in the 1910s. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, WORKMEN'S COMPENSATION STATUTES OF THE UNITED STATES AND FOREIGN COUNTRIES, Bulletin No. 203 (1917)

⁷ See Alexander Volokh, *Medical Malpractice as Workers' Comp: Overcoming State Constitutional Barriers to Tort Reform*, 67 EMORY L. J. 975 (2018).

In the Rawlsian sense, the workers' compensation compromise was worked out behind a veil of ignorance because no one could know, in advance, the identities of future winners and losers under the new law.⁸ Still, that there would be winners and losers no one could have doubted. Possession of a tort right was, and is, mere potentiality until the right is exercised, and speaking about "exchanges" of rights in the abstract is awkward. Yet exchanges of entire categories of rights is how the workers' compensation quid pro quo is typically conceived,⁹ and this article will continue to speak within that framework.

The focus of this article is primarily limited to exploring how the workers' compensation founders thought about benefit adequacy rather than assessing whether present benefits are in fact adequate. But the question of whether workers' compensation benefits were originally reasonable often becomes intertwined with assessments of their current reasonableness or adequacy. As mentioned, under the original workers' compensation bargain, employees who might have been bona fide tort victims were limited to workers' compensation benefits, both indemnity payments for lost wages, and payment for medical expense¹⁰ resulting from work-related injuries. One measure of the reasonableness of workers' compensation benefits might therefore be the extent to which they corresponded (or continue to correspond) to the expected value of foregone tort damages. The problem with this measure is that most negligence cases are imperfect; they will yield something less than the theoretical maximum value of a given claim.¹¹ In addition to complications associated with calculating the expected values of specific litigated cases, there are valuation problems across legal epochs. As jurisdictions have dispensed with all-or-nothing negligence defenses—contributory negligence and assumption of the risk,¹² part of¹³ the "unholy trinity," affirmative-defense-death-knell of many work injuries under the old tort regime¹⁴—the original valuation of cases across a range of possible values has probably changed. The "value" of a tort claim should probably rise, arguably necessitating a "reopener" of the quid pro quo.¹⁵ In a similar vein, the concept of an "accident" may also change over time as the idea of foreseeability

⁸ See *Original Position*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Part 3 (2014) available at

⁹ For a recent example see *Johnson v. U.S. Food Service*, slip op. n.116483 (August 3, 2018) available at <http://www.kscourts.org/Cases-and-Opinions/opinions/CtApp/2018/20180803/117725.pdf> (striking on its face section of Kansas workers' compensation statute calculating partial benefits in a manner likely to produce lower benefits in violation of the quid pro quo under Kansas law).

¹⁰ Though in the very earliest statutes some states did not provide for payment of medical expense at all, some states provided only very limited medical benefits (more like first aid) for a short period of time immediately following a work-related injury (9a maximum of perhaps 60 days), some states paid medical benefits only in the case of the death of the injured worker, and in all cases where medical benefits were paid they were strictly capped. See HARRY B. BRADBURY, *WORKMEN'S COMPENSATION AND STATE INSURANCE LAW OF THE UNITED STATES, 197-201* (The Banks Law Publishing 1912).

¹¹ According to the standard model, "the value of a lawsuit is the probability of the plaintiffs' victory multiplied by the amount to be won, minus transaction costs." John Bronstein, *Some Thoughts About the Economics of Settlement*, 78 *FORDHAM L. REV.* 1129, 1137 (2009); see generally Lucian Arye Bebchuk, *Suits with Negative Expected Value*, Harvard John M. Olin Center for Law and Economics, Discussion Paper No. 226 12/1997, as published in 3 *The New Palgrave Dictionary of Economics and the Law* 551-554 (1998) available at <http://www.law.harvard.edu/faculty/bebchuk/pdfs/Negative-Expected-Value-Suit.pdf>.

¹² See Marianne M. Jennings, *The Impact of Alternative Negligence Defense Rules on Litigation Behavior and Tort Claim Disposition*, 5 *BYU J. PUB. L.* 33 (1991).

¹³ The third such defense was the fellow-servant rule—the employer was not vicariously liable to an employee for the negligence of a co-employee.

¹⁴ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 526-527 (4th ed. 1971).

¹⁵ See *Padgett v. State*, No. 11-13661 CA 25, 2014 WL 6685226 (Fla. Cir. Ct. Aug. 13, 2014) (dismissed on procedural grounds) (trial judge arguing reopener theory).

changes. Accidents (and plaintiffs) in the 21st century may be foreseeable in a way that would not have been possible in the early twentieth century,¹⁶ when workers' compensation statutes originated. On the other hand, cumulative, or gradual, injuries of a kind probably not under contemplation at the time of the original *quid pro quo*, but sometimes covered under the current workers' compensation regime,¹⁷ would be difficult to conceive under a foreseeability-based tort regime.¹⁸ Any reconfiguration of the workers' compensation structure taking these modern variables into account would doubtless require mind-bogglingly complex actuarial assessment. In any event, as some plaintiffs have been arguing,¹⁹ given the immense shift represented by the establishment of a comparative negligence regime, it is plausible that employees would never have agreed to the tradeoff.²⁰

Nevertheless, with respect to the victims of pure accident, the same conversation is inapt. Because these victims would not have been compensated under the tort regime of 1911,²¹ it is not possible to persuasively argue that any level of workers' compensation benefits is "legally" unreasonable. For this category of employees, workers' compensation, almost by definition, functions as a form of social insurance.²² Although this awkward conflation of beneficiaries is ubiquitous, the way it impacts workers' compensation policy discussions is usually not acknowledged.

Social insurance analyses of benefit adequacy often frankly admit the absence of consensus on the meaning of benefit inadequacy.²³ Social insurance analysts also recognize the paucity of raw data relating to workers' compensation benefits in the United States that is easily accessible to academic researchers. Over the last thirty years, for example, it appears that few comparative

¹⁶ See Meiring de Villiers, *Foreseeability Decoded*, 16 MINN. J. LAW, SCIENCE & TECHNOLOGY 343, 344-345 (2015). (discussing changing notions of foreseeability as technology and scientific knowledge advance).

¹⁷ Carpal tunnel syndrome is a good example. See generally 4 LARSON'S WORKERS' COMPENSATION LAW § 50.01.

¹⁸ See generally *Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd (Wagon Mound No. 1)* [1961] UKPC 2, [1961] AC 388; [1961] 1 All ER 404 (18 January 1961) (holding tort damages not available in absence of foreseeability of type of damage plaintiff suffered). That cumulative injuries were not contemplated is suggested by the very limited duration of medical care provided under the earliest American workers' compensation statutes. See generally *infra*. Part III.

¹⁹ See brief of plaintiffs' or their amici in *Vasquez v. Dillard's Inc.*, 381 P.3d 768 (Okl. 2016) brief at 2016 WL 6277356; and *Stahl v. Hialeah Hospital*, 182 So.3d 635 (Fla. 2015) brief at 2015 WL 6951096.

²⁰ Assuming one believes there was ever truly broad employee assent. Scholars have persuasively made the case that installation of the workers' compensation regime represented a multilateral agreement between various stakeholders. See generally PRICE V. FISHBACK AND SHAWN EVERETT KANTOR, *A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION* (University of Chicago Press, 2007). But unions were weak—union density was roughly 5.5% in 1910 (roughly 2 million workers out of a working population of 38 million were union members, see LEO WOLMAN, *UNION MEMBERSHIP IN GREAT BRITAIN AND THE UNITED STATES*, NATIONAL BUREAU OF ECONOMIC RESEARCH, Bulletin 68 (1937) available at <http://www.nber.org/chapters/c5410.pdf>), and the then-voluntarist organized labor leaders instinctively opposed social insurance and only grudgingly accepted workers' compensation because they felt it could not be properly negotiated—as they argued it should be—within collective bargaining agreements. Robert Asher, *The Ignored Precedent: Samuel Gompers and Workers' Compensation*, NEW LABOR REVIEW (Fall 1982).

²¹ The year that comprehensive state workers' compensation systems were first enacted. See generally *infra*. Part III.

²² For this reason, it seems technically inaccurate to refer to workers' compensation generally as a form of social insurance. Compare H. ALLAN HUNT & MARCUS DILLENDER, *WORKERS' COMPENSATION, ANALYSIS FOR ITS SECOND CENTURY*, W.E. UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH (Kalamazoo 2017) available at http://research.upjohn.org/cgi/viewcontent.cgi?article=1262&context=up_press.

²³ H. ALLAN HUNT, *ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS, A REPORT OF THE STUDY PANEL ON BENEFIT ADEQUACY OF THE WORKERS' COMPENSATION STEERING COMMITTEE 19-23*, NATIONAL ACADEMY OF SOCIAL INSURANCE (W. E. Upjohn Institute for Employment Research 2004).

empirical studies of benefit levels have been completed by only a handful of academic social science researchers.²⁴ Despite this shortcoming, in the evolution of workers' compensation benefits, major competing theories of benefit adequacy have emerged.²⁵ The study and articulation of these theories is important; but the present inquiry is more narrowly focused. In this article, the inquiry will be what early architects of workers' compensation statutes meant by benefit adequacy. While society is not necessarily bound by what those architects thought, understanding what the essential workers' compensation social contract was once understood to mean should inform present discussions of benefit adequacy.²⁶

The difficulty with such an inquiry, however, is that early American courts made few attempts to explain *why* workers compensation benefit levels, purportedly established as a quid pro quo for tort damages, were reasonable. Part II of this article analyzes some of the decisions issued by those early courts, and highlights language from the decisions showing that the reasonableness of workers' compensation benefits then under consideration was presumed but never explained. Part III of the article explores early American workers' compensation policy analyses by various private and public-sector stakeholders—beginning in 1909—that were inspired by an investigative team sponsored by the Russell Sage Foundation,²⁷ and initiated by the Minnesota Employees' Compensation Commission.²⁸ Those investigators studied European workers' compensation systems, some of which had already been substantially in place for a quarter-century prior to the enactment of the first American workers' compensation statutes in 1910-1911.²⁹ A second similar investigation and analysis was conducted roughly two years later by the National Association of Manufacturers.³⁰ This article concludes³¹ that already existing international workers'

²⁴ Cullinan, and Curington (1979) (interviewing claimants in California, Florida, New York, Washington, and Wisconsin); California Workers' Compensation Institute (1984) (interviewing California claimants); Berkowitz and Burton (1987) (analyzed wage replacement performance in three states Wisconsin, California, and Florida using injury samplings from 1968); Boden and Galizzi (1999) (comparing injured Wisconsin workers who missed more than one week of work in 1989–1990 to workers with less severe injuries who missed less than one week of work); Peterson et al. (1998) and Reville (1999) (studied replacement rates for PPD claimants in California by matching workers injured in 1993–1994 to uninjured workers employed at the same firm and with similar preinjury wages); Biddle (1998) (estimated lost wages for seriously injured workers in the state of Washington by comparing workers injured in 1993–1994 who received indemnity (wage loss) payments in the 3.5 years after an injury to those who had medical-only claims); Reville et al. (2001) (evaluating the benefit adequacy of workers' compensation for PPD claimants in New Mexico by comparing replacement rates for PPD claimants in New Mexico in 1994–1998 to PPD claimants in California, Wisconsin, Washington, and Oregon over the same period; Hunt (2004) (reviewing the preceding studies); Seabury et al. (2014) (studying New Mexico workers' compensation claims with injury dates from 1994 to 2000. This study linked back to the early Berkowitz and Burton study by utilizing federal data from the Internal Revenue Service and Social Security Administration rather than state unemployment insurance data to determine earning); Dworsky et al. (2016) (studying trends in earnings losses and workers' compensation benefits paid before, during, and after the “Great Recession” in California).

²⁵ HUNT, ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS 19-23.

²⁶ On reimagining the social contract *see generally* Josh Friedman and Michael Lind, *The Past and Future of America's Social Contract*, THE ATLANTIC, December 19, 2013 *available at* <https://www.theatlantic.com/business/archive/2013/12/the-past-and-future-of-americas-social-contract/282511/>.

²⁷ LEE K. FRANKEL AND MILES M. DAWSON, WORKINGMEN'S INSURANCE IN EUROPE (Russell Sage Foundation Publications 1910) *available at* https://www.russellsage.org/sites/default/files/Frankel.Dawson.Dublin_Workingmen_0.pdf.

²⁸ PROCEEDINGS OF THE NATIONAL CONFERENCE ON WORKMEN'S COMPENSATION FOR INDUSTRIAL ACCIDENTS, Atlantic City, New Jersey (July 29-31, 1909).

²⁹ *See infra*. Part III.

³⁰ *See infra*. Part III.

³¹ *See infra*. Part III.

compensation systems, especially the German and English systems, and close American expert policy scrutiny of those systems, persuaded the U.S. Supreme Court to “defer” on the question of employee benefit levels, without discussion, to experts involved in creation of New York’s second attempt at a workers’ compensation act³² during the height of the *Lochner* era.³³ In retrospect, the Court may have been extending its conceptions of state police power to allow for a form of rational basis review of industry-consensual resolution of a “technical” problem.³⁴ From the perspective of employee benefits, the Court itself declined to articulate any specific workers’ compensation standards necessary to maintain the constitutionality of the workers’ compensation system under the United States Constitution. At most, the Court suggested the existence of a benefit floor, and held that the statutes it was reviewing had not fallen beneath that floor.

II. BENEFIT ADEQUACY AS REASONABLENESS AND THE PROBLEM OF NEGATIVE IMPLICATION

In the early part of the 20th century, in response to an epidemic of workplace injuries occasioned by the intensifying industrial revolution,³⁵ states began to experiment with supplanting tort law with workers’ compensation law. The experiment was not new.³⁶ Similar developments had been unfolding in Europe since about 1875.³⁷ This Part discusses court challenges to the implementation of workers’ compensation in the United States.

A. *From Ives to White*

In *Ives v. South Buffalo Railway Co.*,³⁸ the New York Court of Appeals struck as unconstitutional an early New York workers’ compensation statute.³⁹ While not quibbling with the police power authority of the state to correct social evils,⁴⁰ the Court found that, by imposing upon employers liability without fault for employee workplace injuries, the statute “plainly constitute[ed] a deprivation of liberty and property under the federal and state Constitutions . . .”⁴¹ According to the Court, “‘Process of law’ in its broad sense means law in its regular course of

³² See *infra*. Part III.

³³ See David A. Strauss, *Why was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003) (discussing a common view that the U.S. Supreme Court, as reflected in its *Lochner* opinion, “treated rights defined by the common law of contracts as constituting a natural, ‘pre-political’ state of affairs and refused to recognize that those rights are as much the product of state action as the regulatory statutes the Court was invalidating”). The Court decided *Lochner* in 1905. See 198 U.S. 45. Yet the 1917-1922 workers’ compensation decisions seem quite willing to interfere with private contracts between employers and employees. See *generally infra*. Part II.

³⁴ For discussion of the evolution of “police power” rationality review see Thomas v. Nachbar, *The Rationality of Rational Basis Review*, 102 VIRGINIA L. REV. 1627, 1640-41 (2016).

³⁵ Mark Aldrich, *History of Workplace Safety in the United States, 1880-1970*, EH.NET available at <https://eh.net/encyclopedia/history-of-workplace-safety-in-the-united-states-1880-1970-2/>.

³⁶ See *infra*. Part III.

³⁷ FRANKEL AND DAWSON, *WORKINGMEN’S INSURANCE IN EUROPE* at 74 (discussing partial implementation in 1875 of workers’ compensation principles applicable to railway and steamship companies in Switzerland).

³⁸ 94 N.E. 431 (N.Y. 1911).

³⁹ In 1910, New York passed two workers’ compensation statutes, a voluntary statute applicable to all employments and a compulsory statute applicable only to ultrahazardous employment. FISHBACK & KANTOR, *PRELUDE TO THE WELFARE STATE*, *supra*. at 102. It was obviously the compulsory statute that was contentious.

⁴⁰ *Id.* at 437.

⁴¹ *Id.* at 439.

administration through courts of justice, and that is but another way of saying that every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our Constitutions were adopted.”⁴² Thus, *Ives* presumed the existence of “ancient and fundamental principles” predating the U.S. and New York constitutions, and appeared to assume that the 14th amendment of the U.S. Constitution incorporated those principles in the formula “due process of law.”⁴³ The day after *Ives* was decided, the infamous Triangle Shirt Waist fire killed approximately one-hundred and fifty workers in New York City.⁴⁴ The publicity in connection with the fire is often regarded as a significant motivating factor for subsequent amendment of the New York Constitution to allow for enactment of a second workers’ compensation statute.⁴⁵ The constitutional amendment provided in relevant part:

Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws . . . for the payment . . . of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof . . . or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries.⁴⁶

Thus, the state law constitutional basis for *Ives*’ invalidation of the New York workers’ compensation act was removed, while federal constitutional questions had yet to be resolved.

The impact of *Ives* throughout the United States was significant. Seven states, including New York, “went so far as to amend their constitutions to make unquestionably certain that compensation legislation would be legal.”⁴⁷ In 1911, several states were already “drafting workers’ compensation statutes and nine of them, in reaction to *Ives*, decided to create non-compulsory laws permitting employers to elect whether to participate in workers’ compensation systems.”⁴⁸ While some commentators have believed that *Ives* did not in reality represent the majority of legal and judicial opinion at the time, New York’s court of last resort nevertheless exerted substantial influence over state legislatures.⁴⁹

Whereas *Ives* had been employer-centric in its focus—discussing almost exclusively whether a state had the constitutional power to bind employers to compulsory workers’ compensation

⁴² *Id.*

⁴³ *Id.*

⁴⁴ PETER M. LENCIS, *WORKERS’ COMPENSATION: A REFERENCE AND GUIDE* (Westport, CT 1998).

⁴⁵ *Id.* at 12; HERMAN MILES SOMERS AND ANNE RAMSAY SOMERS, *WORKMEN’S COMPENSATION, PREVENTION, INSURANCE AND REHABILITATION OF OCCUPATIONAL DISABILITY* 32 (John Wiley & Sons 1954).

⁴⁶ Art. 1, Section 19 of the New York Constitution (1914) *quoted in id.* at 12.

⁴⁷ SOMERS AND SOMERS, *WORKMEN’S COMPENSATION, supra.* 45, at 32. The states were Arizona, California, New York, Ohio, Pennsylvania, Vermont, and Wyoming. *Id.*

⁴⁸ SOMERS AND SOMERS at 32.

⁴⁹ *Id.* at 32, n.28. Between 1911 and 1917, when the U.S. Supreme Court upheld compulsory workers’ compensation statutes in *White*, *see infra.* at n.5061 and accompanying text, the following states enacted elective, rather than compulsory, statutes: Kansas (1911), Massachusetts (1911), New Hampshire (1911), New Jersey (1911), Wisconsin (1911), Michigan (1912), Rhode Island (1912), Connecticut (1913), Iowa (1913), Minnesota (1913), Nebraska (1913), Nevada (1913), Oregon (1913), Texas (1913), West Virginia (1913), Louisiana (1914), Kentucky (1914), Colorado (1915), Indiana (1915), Maine (1915), Montana (1915), Pennsylvania (1915), Vermont (1915), Delaware (1917), and South Dakota 1917. After 1917, the eight states enacting elective statutes were located in the South: Virginia (1918), Alabama (1919), Tennessee (1919), Missouri (1919), Georgia (1920), North Carolina (1929), Florida (1935), and South Carolina (1935). FISHBACK AND KANTOR, *PRELUDE TO THE WELFARE STATE supra.* at 103-104. Of these states, only Texas remains elective.

laws— the second major workers’ compensation constitutional case arising in New York, *New York Cent. R. Co. v. White*,⁵⁰ discussed the common-law rights of both employers and employees.⁵¹ The employer appealed the underlying workers’ compensation award, rendered in favor of the family of a deceased employee,⁵² on much the same grounds as had been the case in *Ives*.⁵³ On this occasion, however, the issues were purely federal and decided by the United States Supreme Court rather than the New York Court of Appeals.⁵⁴ Just as the New York courts had in *Ives*, the U.S. Supreme Court considered the involved employers’ property rights.⁵⁵ But the Supreme Court also analyzed the question of deprivation of employee tort remedies in exchange for workers’ compensation benefits. The Supreme Court noted that it had already “upheld the authority of the states to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer’s liability for personal injuries to the employee.”⁵⁶ Such departures, while justified, were limited,⁵⁷ and it was unnecessary:

. . . for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of ‘due process of law,’ suddenly set aside all common-law rules respecting liability as between employer and employee, *without*

⁵⁰ 243 U.S. 188 (1917). The administrative decision below affirming the workers’ compensation award of benefits was upheld in the New York appellate courts without opinion in light of the intervening amendment of the state constitution and the subsequent upholding of the Act under the amended constitution in *Jensen v. Southern Pac. Co.*, 109 N.E. 600 (N.Y. 1915) *rev’d* on other grounds 244 U.S. 205.

⁵¹ The railroad appealed on the theories that liability was exclusively governed by the Federal Employers’ Liability Act and that the workers’ compensation award “would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the 14th Amendment.” *Id.* at 191. With respect to employees, the Court said,

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed . . . yet . . . the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer.

Id. at 197 (internal cites omitted).

⁵² *Id.* at 191.

⁵³ *Id.* See *supra*. n.38 and 39 and accompanying text.

⁵⁴ *Id.* at 196-197:

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) That the employer’s property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee’s rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer’s fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.

⁵⁵ *Id.*

⁵⁶ *Id.* at 200.

⁵⁷ *Id.* at 201.

providing a reasonably just substitute. Considering the vast industrial organization of the state of New York, for instance, with hundreds of thousands of plants and millions of wage earners, each employer, on the one hand, having embarked his capital, and each employee, on the other, having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, *it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead.* No such question is here presented, and we intimate no opinion upon it.⁵⁸

For the Court, no such question was presented because,

. . . it is not unreasonable for the state, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall, that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which, in all ordinary cases of accidental injury, he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case, but in all cases assuming any loss beyond the prescribed scale.⁵⁹

None of this was to say,

that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.⁶⁰

One especially underappreciated aspect of *White* is its characterization of the state's interest in preservation of "personal security." Against the employers' arguments respecting their interests, grounded in property and contract, the Court said,

The subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the

⁵⁸ *Id.* The implication is that the New York system then before the Supreme Court was clearly adequate.

⁵⁹ *Id.* at 203-204.

⁶⁰ *Id.*

common welfare. ‘The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.’ It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, *the right to these is often declared, in bills of rights, to be ‘natural and inalienable;’* and the authority to prohibit contracts made in derogation of a lawfully-established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear.⁶¹

Thus, the Supreme Court described life and personal security as inalienable rights that a state could justifiably prioritize over rights of contract and property depending on the circumstances. This emphasis on inalienability, when read in proper context, explained *why* the state could prohibit contracts that would waive rights to any remedy for personal injury.

B. Murky Judicial Negative Implications Not Clarified

White has never been overruled,⁶² but has often been understood in terms of what it claimed not to be saying. It represents, in other words, a species of negative pregnant, or rather a series of negative pregnant statements. A negative pregnant is a “denial implying its affirmative opposite by seeming to deny only a qualification of the allegation and not the allegation itself.”⁶³ The series included the following propositions:

- 1) It is *unnecessary to say* that a state might (without triggering due process concerns) set aside all rules of employer-employee liability without providing a “reasonably just substitute”⁶⁴
- 2) It *perhaps may be doubted* whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead.⁶⁵
- 3) None of this was to say, that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, *would be* supportable.⁶⁶

The Supreme Court apparently denied that an “unreasonably” unjust, inadequate, or sufficiently insignificant remedy was provided under the New York statute, but implicit in the denial was the affirmative opposite of the proposition. *If, generally*, a substitute remedy *was* unjust, or inadequate, or insignificant *then* the state’s actions might violate due process, be subject to doubt, or be insupportable.

⁶¹ *Id.* at 206-207.

⁶² The due process-quid pro quo principle *White* appears to stand for remains an arguably open question at the U.S. Supreme Court. Not much seems to have changed since the Court’s decision in *Fein v. Permanente Medical Group* 474 U.S. 892 (1985), where Justice White made this claim. (White, J., dissenting). Indeed, that is largely the point of this article.

⁶³ BLACK’S LAW DICTIONARY (10th ed. 2014).

⁶⁴ *See supra.* n.58 and accompanying text.

⁶⁵ *Id.*

⁶⁶ *See supra.* n.60.

The problem, of course, is how to interpret such statements now given the evolution of constitutional doctrine. When *White* has been mentioned in modern quid pro quo theory cases,⁶⁷ for example in two “Protection of Lawful Commerce in Arms Act” cases,⁶⁸ the usual response by courts is to say that it is not clear that a quid pro quo for deprivation of tort rights is constitutionally required but, even if it is, the statute in question provides adequate substitute tort remedies.⁶⁹ That reasoning is circular without a baseline, however, and in the absence of defining adequacy such utterances are conclusory. Courts might, of course, simply say that *White* is archaic and should be abandoned; but they do not seem quite willing to do so. The problem with simply abandoning *White* in workers’ compensation contexts is that it is often regarded as the Rosetta Stone to original constitutional justification for workers’ compensation writ large. On some level, it has always seemed to offend legal sensibilities to agree that a legislature could establish any substantive parameters it wished.⁷⁰ The proposition leads too easily to the possibility that a state legislature could eliminate injury remedies altogether. This is simply another face of the perennial tort reform debate on constitutional boundaries,⁷¹ and it is natural to read *White* as forestalling such an outcome. One has difficulty reading *White* without receiving the strong impression that the Supreme Court conditioned the quid pro quo on the availability of adequate or reasonable substitute remedies.

In a case nearly contemporaneous with *White*, and again arising in the context of hazardous employment, *Mountain Timber Co. v. State of Washington*,⁷² the Court took up the question of employee benefits, though, as in *White*, it was the employer who had raised the question of the constitutionality of the statute,

While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed . . . yet it is evident that the employer’s exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers . . . However, so far as the interests of employees and their dependents are concerned, this act is not distinguishable in any point raising a constitutional difficulty from the New York Workmen’s Compensation Act, sustained in [*White*].⁷³

Thus, the two 1917 foundational cases upholding compulsory workers’ compensation systems, as applied to hazardous employment, offered little indication of how reasonableness or adequacy was to be assessed apart from vaguely approving as adequate the statutory structure then under

⁶⁷ As of this writing research revealed five such cases: *Wood v. Central Sand & Gravel Co.*, 33 F.Supp. 40 (W.D. Tenn. 1940); *Lash v. State*, 14 So.2d. 229 (Ala. 1943); *Lash v. State*, 14 So.2d. 235 (Ala. 1943); *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); and *Gilland v. Sportsmen’s Outpost, Inc.*, WL 2479693 (Conn.Super.Ct. 2011).

⁶⁸ See *Ileto v. Glock, Inc.*, and *Gilland v. Sportsmen’s Outpost, Inc.*, *supra*. n.67.

⁶⁹ This was precisely the approach taken in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 88, n.32 (1978).

⁷⁰ See T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 Cambridge L. J. 111 (1985) (distinguishing legislative supremacy from “the rule of law”).

⁷¹ See generally Alexander Volokh, *Medical Malpractice as Workers’ Comp*, *supra*. n7.

⁷² 243 U.S. 219 (1917). In fact, the employee benefits available under the Washington statute differed substantially from those available under the New York statute. See *infra*. at n.185 and accompanying text.

⁷³ *Id.* at 234.

consideration.⁷⁴ It is perhaps surprising that the Court bothered to justify state workers' compensation statutes at all, for courts had repeatedly pointed out that no one had a vested right in a rule of the common law.⁷⁵ Yet, the question of reasonableness to employees was nevertheless addressed in *Mountain Timber* and in *White* virtually *sua sponte*.⁷⁶

It is possible to read two cases from the Supreme Court's 1919 term, *New York Cent. RR. Co. v. Bianc*,⁷⁷ and *Arizona Copper Co. v. Hammer*,⁷⁸ as both endorsing *and* restricting a muscular legislative supremacy welded to federalism. In *Bianc*,⁷⁹ the Court concluded that a state could award workers' compensation benefits for facial or bodily disfigurement even where no impact on an employee's earning capacity had been established.⁸⁰ Noting that "a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its effect upon his mere capacity for work,"⁸¹ the Court said,

If a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine.⁸²

In the *Arizona Copper* cases⁸³ the Court rejected employers' arguments that the Arizona Employers' Liability Act deprived them of liberty and property. The employers had objected to several features of the law, and the Court responded in a manner that could just as easily be applied to employee benefits as employer defenses:

Some expressions contained in our opinion in the *White* Case . . . are treated in argument as if they were equivalent to saying that if a state, in making a legislative adjustment of employers' liability, departs from the common-law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course, nothing of the kind was intended. In a previous part of the opinion . . . it had been shown that the employer had no constitutional right to

⁷⁴ The original New York Workers' Compensation Act provided, in Section 219(a), a death benefit of 1200 times the daily earnings capped at \$3000; 50% of the average weekly wage if totally incapacitated and if partially incapacitated in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in the same employment or otherwise after the accident, but shall amount to one-half of such difference. "In no event shall any compensation paid under this article exceed the damage suffered, nor shall any weekly payment payable under this article in any event exceed ten dollars a week or extend over more than eight years from the date of the accident." *Ives, supra.*, 94 N.E. 431.

⁷⁵ *Munn v. Illinois*, 94 U.S. 113 (1876). For an exhaustive discussion of this point see John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L. J. 524, 527 (2005).

⁷⁶ See *supra.* n.73 and accompanying text; see also the similar statements in *White, supra.* n.51.

⁷⁷ 250 U.S. 596 (1919).

⁷⁸ 250 U.S. 400 (1919),

⁷⁹ *Id.* There were three consolidated cases.

⁸⁰ *New York Cent. RR. Co. v. Bianc, supra.*, 250 U.S. at 601.

⁸¹ *Id.*

⁸² *Id.* at 602 quoting *Arizona Copper Co. v. Hammer, supra.* at 429.

⁸³ *Arizona Copper Co., supra.*, 250 U.S. at 400. There were five consolidated cases.

continued immunity from liability in the absence of negligence, nor to have the fellow servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured—an additional feature at variance with the common law—was then upheld; but, of course, without saying that no other would be constitutional.⁸⁴

By implication this passage suggests that the *Arizona Copper* Court would have held, upon challenge by “injured workmen,” that the statutory plan of compensation for those workmen could have taken other (more meager) forms without offending the Constitution. *Bianc* and *Arizona Copper* thus seemed to establish that states had very wide latitude in designing workers’ compensation systems, even as each case continued to hint at the need for reasonableness and “fair results.”⁸⁵

When the Court decided the constitutionality of compulsory state workers’ compensation statutes as applied to *non*-hazardous employments in 1922, in *Ward & Gow v. Krinsky*,⁸⁶ it was not presented with, and did not independently discuss, the adequacy or reasonableness of employee benefits. In its general defense of compulsory workers’ compensation systems and employee liability acts, however, the Court said,

A sufficient vindication of compulsory Workmen's Compensation and Employers’ Liability Acts, as it has seemed to this court, is found in the public interest of the state in the lives and personal security of those who are under the protection of its laws, from which it follows that, when men are employed in hazardous occupations for gain, it is within the power of the state to charge the pecuniary losses arising from disabling or fatal personal injury, to some extent, at least, against the industry after the manner of casualty insurance, instead of allowing them to rest where they may happen to fall, upon the particular injured employees or their dependents, and to this end to require that the employer—he who organizes and directs the enterprise, hires the workmen, fixes the wages, sets a price upon the product, receives the gross proceeds, pays the costs and the losses, and takes for his reward the net profits, if any—shall make or secure to be made such compensation as reasonably may be prescribed, to be paid in the event of the injury or death of one of those employed, instead of permitting the entire risk to be assumed by the individuals immediately affected. In general, as in the New York law, provisions for compulsory compensation are made to apply only to those employed in hazardous occupations, where it may be contemplated by both parties in advance that sooner or later some of those employed probably will sustain accidental injury in the course of the employment, but where nobody can know in advance which particular employees or how many will be the victims, or how serious will be the injuries.

Krinsky, while offering a much more sophisticated economic justification for compulsory workers’ compensation, even as applied to nonhazardous employment, again discussed liability as

⁸⁴ *Id.* at 429.

⁸⁵ *See supra.* n.82.

⁸⁶ 259 U.S. 503 (1922).

“such compensation as reasonably may be prescribed” by the state. Throughout the decade, the Court accepted—in *White*, in *Bianc*, and now in *Krinsky*—that the New York schedule of benefits was fair, or adequate, or reasonable. But why?

Seemingly uncritical acceptance of workers’ compensation employee benefit levels by courts was not likely the by-product of lack of political controversy, however. Benefit levels were in fact controversial throughout the United States during the period of the Supreme Court’s acceptance of the system.⁸⁷ In an influential text on the origins of workers’ compensation, *The Prelude to the Welfare State*, Price Fishback and Shawn Kantor devoted a chapter to American political struggles over benefit levels as workers’ compensation statutes were being implemented in various states. The conclusion of these scholars is that, as workers’ compensation evolved in its nascent decades, benefit levels were influenced by workers, employers, and social reformers. “[H]ow workers’ compensation benefits varied across states depended on the relative strength of the interest groups and the economic factors that influenced their demands.”⁸⁸ This is what one would expect, leaving to one side doubts about widespread employee participation in the process (if nothing else, workers were voters).⁸⁹ The benefit level debate must have proceeded from baselines, however. Where did the baselines originate? Although this Part has shown that the Court broadly approved workers’ compensation statutes in a handful of states, *White*, arising from powerful and influential New York, was the Court’s first opinion, and was evidently the touchstone for all that followed. Why was the Court convinced that the New York system was reasonable and adequate?⁹⁰

III. 1917 CONTEXT

This Part discusses the social context in which the just discussed, seminal workers’ compensation cases were being decided. Specifically, it will show the constant interplay between relatively unknown private actors and state workmen’s compensation commissions appointed by

⁸⁷ George Young, a Wyoming representative perhaps echoing some national sentiment, was not happy with first-decade-of-the-20th century benefit levels in Wyoming:

The workingmen of Wyoming want a workman’s compensation law. They naturally want a law that carries the very highest possible benefits. I want to say now that it is my honest conviction that the benefits specified in this act are too low. It is true that we have no adequate figures at hand, that apply particularly to our State, that would let us accurately base a demand for higher rates with the certain knowledge that the fund accumulated would pay for them. It is because of this, and because of the fact that presenting a demand for higher rates of compensation would open the way for all sorts of amendments to the bill, that I make this statement. The time for consideration of the bill is short; amendments here might encourage amendments elsewhere; opposition might be excited to the measure, and I want no act of mine to endanger the passage of the bill . . .

Wyoming House Journal, 13th Leg. 329 (statement of Rep. Young)

⁸⁸ PRICE V. FISHBACK AND SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE, *supra*. at 173

⁸⁹ *Id.*

⁹⁰ Part of the equation probably has to do with the arguments parties were not advancing because of the procedural posture of cases. As the lead cases demonstrate, litigation was usually launched by companies challenging the scope of the state’s police power. The question of employee remedies and benefits would not have been featured. Nevertheless, it is not inconceivable that employers could have aggressively pursued theories of employee benefit inadequacy as a strategy for scuttling the scheme. The Court demonstrated in both *White* and *Mountain Timber* that it was willing to consider such arguments. *See supra*. n.73 and accompanying text.

governors and legislators during the first decade of the twentieth century to make recommendations concerning workers' compensation systems. The Part will also show that canvassing of European workers' compensation systems by private actors crystalized options and was substantially responsible for creating the New York proto-statute that was ultimately ruled constitutional by the U.S. Supreme Court in *White*.

A. Background

It is easy for 21st century readers to underappreciate the magnitude of the late 19th and early 20th century workers' compensation project. As John Fabian Witt has noted, during this period policy makers and academics were involved in a "vibrant transatlantic dialogue" on industrial accidents.⁹¹ Why transatlantic? Because several European workers' compensation statutes were already in existence beginning in the late 19th century, and Europe had a substantial influence on the development of American workers' compensation systems.⁹²

Witt also notes that,

In the first decade of the twentieth century, as workmen's compensation statutes became a topic of serious of conversation in American legislatures, teams of reformers and academics travelled to Europe under the aegis of such organizations as the Russell Sage Foundation, the National Association of Manufacturers, and the Department of Labor to see for themselves how other nations dealt with accident compensation.⁹³

This article contends that it was dialogue between the teams Witt mentions and state commissions that created benchmarks of adequacy against which the Supreme Court considered the New York statute, *sub silentio*. The teams had as a stated objective creation of a uniform law that could be tested against constitutional challenge in impact litigation.⁹⁴ Model workers' compensation statutes were in fact drafted and nationally circulated,⁹⁵ though only after the first major workers' compensation statute had been struck by the New York Court of Appeals.⁹⁶ The process resembled a regulatory negotiation resulting in consensus standards.⁹⁷ Broad, extra-legal negotiation was not unknown to policy makers of the early 20th century, and an apt comparison could be made to mostly private labor-management negotiation of the federal Railway Labor Act in 1926.⁹⁸ Viewed in this way, *White* and its progeny were nascent "deference" cases in which

⁹¹ JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 9, n.38 (HARVARD UNIVERSITY PRESS 2009).

⁹² Joseph LaDou, *The European Influence on Workers' Compensation Reform in the United States*, 10 ENVIRON. HEALTH 103 (2011) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3267658/>.

⁹³ *Id.* at 9, n.42.

⁹⁴ NATIONAL CONFERENCE ON WORKMEN'S COMPENSATION FOR INDUSTRIAL ACCIDENTS, PROCEEDINGS, 1st, Atlantic City, New Jersey 1909, at 51-52 available at <https://babel.hathitrust.org/cgi/pt?id=inu.32000000094435;view=1up;seq=9>

⁹⁵ *See e.g.* PROCEEDINGS, THIRD NATIONAL CONFERENCE WORKMEN'S COMPENSATION FOR INDUSTRIAL ACCIDENTS, Chicago, Illinois 1910 available at <https://babel.hathitrust.org/cgi/pt?id=umn.31951002082754>.

⁹⁶ *See supra.* at n.38.

⁹⁷ For a discussion of the ways in which private negotiations can resemble regulatory negotiation *see* Philip J. Harter, *Negotiating Regulations, A Cure for Malaise*, 71 *Geo. L. Rev.* 1, 35 (1982).

⁹⁸ *See* Laurence Scott Zakson, *Railway Labor Legislation 1888-1930: A Legal History of Congressional Labor relations Policy*, 20 *RUTGERS L. J.* 317, 362 n.247 (1989) (describing six months of conferencing between

informally-appointed, quasi-political commissions played the role of ad hoc expert agencies involved in analysis of a national problem during a period preceding the mature federal administrative state.⁹⁹ It is true, of course, that deferring to experts reveals only what is reasonable and not what is unreasonable, and that is perhaps a good way to explain some of the modern disutility of *White*. Still, glimpsing the nature of expert opinion of the 1910s provide insight into the contemporaneous scope of reasonableness which probably influenced the Court.

B. The 1909/1910 National Conference on Workmen's Compensation for Industrial Accidents: The Minnesota Initiative

The first of the important expert bodies of the decade was the National Conference on Workmen's Compensation for Industrial Accidents. On July 29, 1909, a conference on workers' compensation was convened in Atlantic City, New Jersey. The announcement of the conference sent to invitees stated,

You are, invited to be present at The Marlborough-Blenheim, at Atlantic City, July 29-31 and take part in a conference with the various State and Government officials and others interested in legislation changing the basis of recovery, for injuries received in the course of employment from that of negligence or fault of the employer, to that of risk of the industry or insurance; at which conference the persons whose names appear under the several subjects will be asked to lead the discussions along the respective lines appearing in the program herein. You are requested to extend this invitation to such persons as can contribute knowledge on the subject.¹⁰⁰

The Chair of the Minnesota Employees' Commission signed the announcement.¹⁰¹ A second such conference was held on January 20, 1910, and a third on June 10, 1910.¹⁰² One could argue, based upon these conferences, that the Minnesota Commission was a prime mover in national workers' compensation dialogue. During the June 1910 conference, for example, attended by representatives of state workers' compensation commissions or delegations from Minnesota, Wisconsin, New York (Crystal Eastman appeared, among others), Illinois, Massachusetts, Michigan, Maryland, and Connecticut,¹⁰³ the Minnesota Commission outlined its workers' compensation process to date. The Commission explained that after identifying the need for a

representatives of labor and management which produced a proposal that would become in all important respects the Railway Labor Act of 1926).

⁹⁹ This conceptualization gives renewed emphasis to the excellent title of Price Fishback and Shawn Kantor's influential book cited throughout this article: "Prelude to the Welfare State." One might add, "Prelude to the *Administrative State*."

¹⁰⁰ NATIONAL CONFERENCE ON WORKMEN'S COMPENSATION FOR INDUSTRIAL ACCIDENTS, PROCEEDINGS, 1st, Atlantic City, New Jersey 1909 available at <https://babel.hathitrust.org/cgi/pt?id=inu.3200000094435;view=1up;seq=9>. (hereinafter PROCEEDINGS, FIRST NATIONAL CONFERENCE).

¹⁰¹ *Id.*

¹⁰² PROCEEDINGS, THIRD NATIONAL CONFERENCE WORKMEN'S COMPENSATION FOR INDUSTRIAL ACCIDENTS, Chicago Illinois 1910 available at <https://babel.hathitrust.org/cgi/pt?id=umn.31951002082754>. (hereinafter PROCEEDINGS, THIRD NATIONAL CONFERENCE).

¹⁰³ See PROCEEDINGS, THIRD NATIONAL CONFERENCE at 10-38.

national workers' conversation at a Minnesota State Bar Association meeting in 1908, the Bar Association created a Minnesota Commission comprised of various stakeholders from within the state.¹⁰⁴ The newly-minted Commission widely canvassed a range of opinion on the failings of the tort system to remedy workplace injuries. Eventually, the Commission, with the assistance of various commentators, drew up a Model Code, which it distributed and discussed at the June 10 meeting.

The Code would apply to all employers and not just those engaged in extrahazardous industries.¹⁰⁵ For injuries resulting in immediate death, death occurring within five years, or total incapacity of five years or longer, the Code would have provided sixty-percent of wages the injured worker was receiving at time of injury, for a period of five years, up to a maximum of three-thousand dollars.¹⁰⁶ For incapacity lasting fewer than five years, the Code would have provided sixty-percent of the pre-injury wage, or sixty-percent of the wage-loss occasioned by the injury, depending on whether incapacity was total or partial.¹⁰⁷ In addition, the Code would have provided for a schedule of supplemental benefits when certain parts of the body were injured: forty percent of pre-injury wages for five years for loss of both feet, both hands, or a foot and a hand;¹⁰⁸ fifteen percent of pre-injury wages for five years for loss of a foot, a hand or an eye.¹⁰⁹ Recovery for "maiming" of the scheduled body parts could be adjusted proportionally.¹¹⁰ But limits applied to the stacking of benefits: in no instance could all benefits exceed what the injured worker had been earning in wages at the time of injury; and in no event could all benefits received exceed five thousand dollars.¹¹¹ The Code would not have provided for payment of medical expenses incurred as a result of work-related injuries.

The treatment of extrahazardous employments was novel. Although several of the earliest workers' compensation statutes in the United States—including New York's—were elective, or voluntary, for non-extrahazardous employers, the Code would have defined hazardous employment sufficiently broadly that any employer experiencing an accident was essentially hazardous. Thus, as a practical matter, the Code would have been compulsory for most employers and employees. Additionally, the remedies for work-related injuries as defined in the Code would have been exclusive:

Sec. 4. Repeal of other liabilities. The right to compensation and the remedy therefor, as herein specified, shall be in lieu of all other causes of action for such injuries and awards upon which they are based as to all persons covered by this act, whether formerly authorized or allowed by, or as the result of, either state, statute or common law, and no other compensation, right of action, damages or liability, either for such injuries or for any result thereof, either in favor of those covered by this act or against such employer based on state law, shall hereafter be allowed for such injuries to any persons or for any of the injuries covered by this act so long as

¹⁰⁴ *Id.* at 33-34.

¹⁰⁵ *Id.* at 40.

¹⁰⁶ *Id.* Roughly \$80,000 in 2018 dollars. This and all upcoming inflation conversions for weekly benefit amounts are based on the Bureau of Labor Statistics CPI Inflation Calculator *available at* <https://data.bls.gov/cgi-bin/cpicalc.pl>

¹⁰⁷ *Id.* Wage-loss benefits would be obtained by subtracting post-injury wages from the pre-injury wage and taking sixty-percent of the difference.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 41.

¹¹¹ *Id.* About \$132,600 in 2018 dollars.

this law shall remain in force, unless, and then only to the extent, that this law shall be specifically amended.¹¹²

In reflecting upon the proposed Code, it should be born in mind that the Minnesota Commission had reportedly gathered information and data from the states of Massachusetts, Illinois, and New York; it sought but could not obtain relevant data from various charities, unions, or (at least at that time) from the National Association of Manufacturers; it wrote to conservative labor leader Samuel Gompers, who, interestingly, had not yet adequately studied the matter; it wrote to radical labor leader Eugene Debs, who had studied the matter more comprehensively than Gompers and provided comparative information about international workers' compensation systems; and it had communicated with industrialist Andrew Carnegie, who said he preferred the English system.¹¹³ The Minnesota Commission was aware of the various constitutional challenges likely to be raised, and addressed them in its report.¹¹⁴

The Minnesota Commission made direct contact with the Russell Sage Foundation investigators who were studying, during the summer of 1908, the design of European workers' compensation systems. After establishing the Russell Sage contacts, the Minnesota Commission invited the investigators to the conference of July 1909, thereby sharing with state officials, and others, details of the operation of European and British Commonwealth systems,¹¹⁵ some of which had been in existence since 1877.¹¹⁶ Dr. Lee K. Frankel, one of the principal Russell Sage Foundation investigators, candidly stated at the July 1909 conference:

I hope that the outcome of this meeting will be some effort toward uniformity in legislation. You will notice that I have refrained from expressing any opinion as to whether any of the foreign systems are adaptable to the United States. My own thought is that between the compulsory scheme in Germany and the purely compensatory scheme in England we shall find some sort of a mean that is adaptable to and that can be practically administered in the United States. We shall probably find that such a scheme will be adaptable not only to one but to all of our states. Except so far as their geographical situation is concerned, and so far as there may be certain industries in certain localities, there are not sufficient differences between our states to warrant us in having different legislation in each state. If this meeting can do nothing else than to get together on some uniform basis, it would be doing a great deal. I thoroughly believe that if we are ever to obtain such legislation here, it will have to be done by a concurrence of opinion on the part of such commissions as are already created, so that each one shall be able to recommend to their respective legislatures a draft of a bill with the statement that this draft has been accepted by the commissions of other states. The moral force of such a statement in the beginning of new legislation cannot be over-estimated.¹¹⁷

¹¹² *Id.* at 41.

¹¹³ *Id.* 34-25. See *infra*. n.125.

¹¹⁴ *Id.* at 35.

¹¹⁵ PROCEEDINGS, FIRST NATIONAL CONFERENCE, *see especially* testimony of Dr. Lee K. Frankel at 231-244. Frankel discussed the systems of England, Sweden, Belgium, France, Italy, Germany, Austria, and Switzerland.

¹¹⁶ *Id.* 237-238.

¹¹⁷ *Id.* at 243.

The statement strongly suggests that from the beginning of serious national deliberation on workers' compensation—involving state commissions,¹¹⁸ academics, NGOs, and insurance companies¹¹⁹—national uniformity was an important goal, and European systems were to be studied closely and emulated wherever possible. The statement also suggests that, despite broad conversation on several European laws, the German and English systems were quickly the leading candidates for emulation. From the point of view of employee benefits,¹²⁰ what were the differences between the German and English systems? A summary comparison prepared by the Bureau of Labor Statistics, in 1917, helps to explain the features of the two systems as they would have existed in around the first decade of the twentieth century, when the National Conferences were being held.¹²¹

1. *The German System*¹²²

The German Act was first enacted in 1884, and then amended several times. The Code of 1911 compensated injuries by accident in the course of the employment, causing death, or disability for more than three days, unless caused intentionally by the injured worker. Compensation could be denied or reduced if injury was sustained while the worker was committing an illegal act. A variety of industries were covered, and while most were extrahazardous, many were not. Covered individuals included all “workmen and apprentices,” and certain government officials. Importantly, voluntary coverage of employers not under the jurisdiction of the law could be approved by the State, upon request. The statute covered medical and surgical treatment for ninety-one days following the injury. Benefit payments from the beginning of the fourth to the ninety-first day were provided by sick-benefit funds, to which employers contributed one-third and employees two-thirds. From the beginning of twenty-ninth day post-injury, to the ninety-first day, payments were increased by one-third, solely at the expense of the involved employer. After the ninety-first day, and in case of death from injuries, the expense of the injury was borne by employers' associations, which were supported by the contributions of employers (but not employees).

Compensation for death included:

- (a) Funeral benefits of one-fifteenth of annual earnings of deceased, but not less than 50 marks (\$11.90).

¹¹⁸ *Id.* at 1-2. Present at the first conference were members of the state commissions (or other state officials) from Minnesota, Wisconsin, Washington D.C., and New York.

¹¹⁹ *Id.* The list of attendees at the first conference included executives or representatives from Aetna Life Insurance Co., Travelers Insurance Co., General Accident Insurance Corporation, Fidelity and Casualty Co., United States Casualty Co., Ocean accident and Guaranty Co., Maryland Casualty Co., and Liability Insurance.

¹²⁰ Structurally, the two systems were very different in that the German system compensated in an integrated manner sickness, workplace injury, and disability within an overall social insurance scheme while the British system was focused exclusively on workplace injuries. A full discussion of the many differences between the two systems is beyond the scope of this article.

¹²¹ Comparisons based on summaries compiled in U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, WORKMEN'S COMPENSATION STATUTES OF THE UNITED STATES AND FOREIGN COUNTRIES, Bulletin No. 203, *supra*. at 316-317.

¹²² *Id.* at 316.

(b) Pensions to dependent heirs not exceeding 60 per cent of annual earnings of the deceased .

¹²³

Compensation for disability included:

(a) Free medical and surgical treatment paid during the first 13 weeks of incapacity by sick benefit funds and afterwards by employers' associations.

(b) For temporary or permanent total disability, 50% of daily wages of persons similarly employed, but not exceeding 3 marks (71 cents), paid by sick benefit funds from beginning of fourth day to end of fourth week; from fifth to end of thirteenth week, above allowance by sick benefit fund, plus 16 1/3% contributed by the employer directly; after 13 weeks, 66 2/3% of average annual earnings of injured person paid by employers associations.

(c) For complete helplessness necessitating attendance, payments could be increased to 100% of annual earnings.

(d) For partial disability, a corresponding reduction in payments was made.

(e) If annual earnings [from benefits payments] exceeded 1,800 marks (\$428.40),¹²⁴ only one-third of the excess was considered in computing pensions.

Benefit payments could be revised whenever a change in condition of an injured worker occurred.

Disputes were settled by the "superior insurance offices," composed of Government officials and an equal number of representatives of employers and employees.

2. *The English System*¹²⁵

The English Act was first enacted in 1897, and the Russell Sage investigators would have been doing their work after the passage of a major amendment in 1906, which went into effect in 1907. The law compensated injuries by accident arising out of and in the course of the employment, which caused death, or disabled a workman for at least one week from earning full wages. Compensation was not paid when injury resulted from the serious and willful misconduct of a worker, unless it caused death or serious and permanent disability. "Any employment" was covered as was "any person regularly employed for the purposes of the employer's trade or business whose compensation was less than £250 (\$1,216.63) per year (persons engaged exclusively in manual labor were not subject to this limitation).¹²⁶ The Act applied to civilian persons employed under the Crown (government employees) as if the employer were a private person. The entire cost of compensation rested upon the employer.

¹²³ Apportionment between heirs is omitted in this exposition.

¹²⁴ \$11,363 in 2018 dollars.

¹²⁵ Summary provided in U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, WORKMEN'S COMPENSATION STATUTES, Bulletin No. 203. *supra.* at 317.

¹²⁶ Roughly \$32,300 in 2018 dollars.

Compensation for death included:

(a) A sum equal to three years' earnings, but not less than £150 (\$729.98) nor more than £300 (\$1,459.95),¹²⁷ to those entirely dependent on the earnings of the deceased.

(b) A sum of less than the above amount if deceased left persons partially dependent on his or earnings, with the amount to be agreed upon by the parties or fixed by arbitration.

(c) Reasonable expenses of medical attendance and burial, but not to exceed £10 (\$48.67),¹²⁸ if deceased left no dependents.

Compensation for disability:

(a) A weekly payment during incapacity of not more than 50% of an employee's average weekly earnings during previous twelve months, but not exceeding £1 (\$4.87)¹²⁹ per week; if incapacity lasted less than two weeks no payment was required for the first week.

(b) A weekly payment during partial disability, not exceeding the difference between the employee's average weekly earnings before injury and the average amount which he or she was earning, or was able to earn, after injury.

(c) Minor persons' earnings were fully covered during incapacity, but weekly benefits could not exceed 10 shillings (\$2.43).¹³⁰

(d) A sum sufficient to purchase a life annuity of 75% annual value of weekly payments could be substituted, on application of the employer, for weekly payments after six months; but other arrangements for redemption of weekly payments could be made by agreement between employer and employee.

Weekly payments could be revised at the request of either party, under regulations issued by the secretary of state.

Employers could make contracts with employees for substitution of a scheme of compensation, benefit, or insurance in place of the provisions of the act, if officials certified the scheme was not less favorable to the workmen and their dependents than the provisions of the act, and that a majority of the employer's workmen were favorable to the substitute. The employer was then liable only for compliance with the provisions of the scheme.

In case of an employer's bankruptcy, the amount of compensation due under the act, up to £100 (\$486.65) in any individual case, was classed as a preferred claim.

Questions arising under the law were settled either by committee representatives of the employer and the employer's workmen, by an arbitrator selected by the two parties, or, if the parties could not agree, by the judge of the relevant county court, who could appoint an arbitrator to act in the judge's place.

¹²⁷ Not less than \$19,344 or more than \$38,725 in 2018 dollars.

¹²⁸ About \$1291 in 2018 dollars.

¹²⁹ About \$129 in 2018 dollars.

¹³⁰ About \$64 in 2018 dollars.

Thus, the German and English systems paid indemnity benefits of between 50% and 66 2/3% of the average weekly wage of the injured or deceased worker. The German system appears to have been substantially more generous than the English system with respect to medical benefits; and it is possible that those who favored the English system did so for this reason. Indeed, this may be understating the case because the English Act of 1906 contained no provision for payment of work injury-related medical benefits,¹³¹ while the German system typically provided full medical benefits for the duration of a disability caused by an accident.¹³² Eventually, in 1911, the English enacted a national insurance law, the National Insurance Act 1911,¹³³ championed by David Lloyd George, drawing as inspiration Bismarck's 1884 comprehensive code, of which the German workers' compensation system under discussion was a part.¹³⁴

The German system also appeared to treat beneficiaries of workers killed by work-related injuries more favorably than did the English system.

C. The 1911 National Association of Manufacturers Report

The Minnesota Commission was not alone in investigating the feasibility of implementing workers' compensation in the United States. The National Association of Manufacturers (NAM) was also directly involved in researching workers' compensation systems, a process it was carrying out just as the Minnesota Commission was reporting findings in connection with its investigations. To this end, that organization dispatched Fred G. Schwedtman and James E. Emery on a four months' investigation of Europe, where the two men personally visited the countries of England, Germany, France, Austria, Hungary, Belgium, Holland, Switzerland, and Italy.¹³⁵ Each of these countries had already established workers' compensation systems.¹³⁶ The team produced an exhaustive report, which was adopted by the NAM. The document ran two hundred and sixty-nine pages, and, among other things, made an extended comparison of the English and German systems. As significant as the findings and conclusions reached by the drafters of the document turned out to be, the sheer number of sources relied upon to generate those findings and conclusions rendered it authoritative. Like the Russell Sage report, the NAM report resembled an expert governmental document. Many experts were consulted in the course of its creation, particularly from

¹³¹ 6 Edw. VII, c.58, First Schedule, *as reproduced in* 2 HARRY B. BRADBURY 1735 (2nd. Ed. 1914).

¹³² GERMAN WORKMEN'S INSURANCE CODE, BOOK THREE, SECTION 2, ART. 555(1), *as reproduced in* 2 HARRY B. BRADBURY 2028.

¹³³ See JOHN HENRY WATT, THE LAW RELATING TO NATIONAL INSURANCE: WITH AN EXPLANATORY INTRODUCTION 76 (Stevens and Sons 1913) (defining covered individuals as all persons employed). After 1911, there was no need to pay for medical benefits under the British workers' compensation statutes.

¹³⁴ Although beyond the scope of this article, the German code was actually three laws in one: the Health Insurance of Workers Law of 1883 (covering illness); the Accident Insurance Law of 1884 (work injuries); and the Old Age and Invalidity Law of 1889 (pensions and long-term total disability). ERIC SOLSTEN, ED., GERMANY: A COUNTRY STUDY 200 (Federal Research Division, Library of Congress 1996).

¹³⁵ FRED G. SCHWEDTMAN AND JAMES E. EMERY, ACCIDENT PREVENTION AND RELIEF: AN INVESTIGATION OF THE SUBJECT IN EUROPE, WITH SPECIAL ATTENTION TO ENGLAND AND GERMANY: TOGETHER WITH RECOMMENDATIONS FOR ACTION IN THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA xxiii *available at* <https://babel.hathitrust.org/cgi/pt?id=mdp.39015030424603;view=1up;seq=29>.

¹³⁶ See generally, *supra.*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, WORKMEN'S COMPENSATION STATUTES, Bulletin No. 203.

Germany.¹³⁷ Moreover, the report claimed to have surveyed ten-thousand employers in advance of its issuance.¹³⁸ The cover pages of the report bore the names of individuals drawn from an extremely broad swath of American industrialism.¹³⁹ Notably, the report reflected, in those same cover pages, the name of J.M. Glenn, Director of the Russell Sage Foundation, who was also a member of NAM's "Advisory Board of the Committee on Industrial Indemnity Insurance."¹⁴⁰ A summary of the report's findings is enough to capture the depth of the NAM's deliberations:

- Limited compensation for work-related personal injuries already existed in the major European countries and British Colonies based on the recognition that industrial accidents are often simply unavoidable and the cost for those accidents should not be born exclusively by the workman but should be treated as a cost of production and spread accordingly.¹⁴¹
- Handling workplace injuries leads to bitterness and it was in the public interest to expedite the process.¹⁴²
- Self-inflicted injury should result in reduced or no compensation¹⁴³
- All employments should be included in the system¹⁴⁴
- While the European systems were not perfect, they worked well enough to provide conclusive evidence that the general approach of workers' compensation socially, economically, and industrially advantageous¹⁴⁵
- The proposed system could not work without vigorous accident prevention and provision to injured workers of first-aid without risk of diminished benefits¹⁴⁶
- Professional administrators were necessary to carry out the requirements of workers' compensation acts and to adjust practices where necessary¹⁴⁷
- The German Empire had been the most successful in applying workers' compensation because of its careful compilation of statistics and scientific study of accident avoidance (though many details of its administration were neither applicable nor desirable¹⁴⁸
- The chief principles of the German system could be adopted in the states "by voluntary action or through permissive legislation and, in a large degree compelled by statute."¹⁴⁹
- The basis of workers' compensation systems in Europe was compensation for loss of work capacity and was not based on fault¹⁵⁰

¹³⁷ See SCHWEDTMAN AND EMERY, ACCIDENT PREVENTION AND RELIEF, Appendix I, 273-327 (reproducing approximately twenty-five uniformly positive letters from prominent German authorities on their impressions of the operation of the German system).

¹³⁸ SCHWEDTMAN AND EMERY, *supra*. at xiii.

¹³⁹ *Id.* at vii-xi.

¹⁴⁰ *Id.* at x.

¹⁴¹ *Id.* at 259.

¹⁴² *Id.* at 259-260.

¹⁴³ *Id.* at 260.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 261.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 262.

- If every employer became a limited insurer in law, it should also become an insurer in fact, and the obligation to pay into a common insurance fund should be a substitute for legal liability¹⁵¹
- Limited compensation through insurance was most successfully obtained through creation of a fund administered by the state, or a fund supervised by the state, or through voluntary mutual associations, or in private insurance associations¹⁵²
- Employees should pay a small portion towards maintenance of the insurance fund to discourage fraudulent claims and encourage mutual cooperation¹⁵³
- A single liability (in other than exceptional cases) should apply and a workers' compensation system should discourage all other legal liability¹⁵⁴
- The principle of compensation should be universal, or it places unequal burdens on classes of employers and denies compensation to "vast classes of" employees¹⁵⁵
- Compensation in Europe was not regarded as a complete indemnity but as a "substantial expression of the impairment of earning capacity"¹⁵⁶
- The better systems neither allowed nor intended to "recompense trivial injuries nor breed paupers by corrupting thrift" and, accordingly, waiting periods¹⁵⁷ were desirable, though employers should provide medical first aid during those waiting periods¹⁵⁸
- The system should feature cheap and expeditious adjustment of claims along the lines of European systems of arbitration, subject only to questions of law that may arise for the courts¹⁵⁹
- Any application of workers' compensation in the United States must be substantially uniform or it would produce harmful conditions¹⁶⁰
- NAM was aware that significant legal challenges to the system would occur but encouraged voluntary actions by private employers and implementation by states of voluntary schemes of compensation until legal questions had been resolved

The NAM report concluded:

Successful legislative action throughout Europe has been preceded by deliberate and painstaking investigation, extending in many instances through years of effort in the collection and comparison of information. We are fortunately able to avail

¹⁵¹ *Id.*

¹⁵² *Id.* at 263.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 264.

¹⁵⁵ *Id.* at 265.

¹⁵⁶ *Id.* This, of course, is where all the fighting occurs. How substantial?

¹⁵⁷ A waiting period is a feature of many workers' compensation systems and essentially excludes coverage of injuries unless disability lasts long enough to become compensable. The period in modern times extends from roughly one to three weeks. *See* 15 LARSON'S WORKERS' COMPENSATION LAW [Table 14].

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 265-266.

¹⁶⁰ *Id.* at 266.

ourselves of the most practical features of the Old World's labor and experience. But we should make a start for ourselves here and now, providing at once for the accumulation in our respective states of that accurate information which is a basic necessity for intelligent action. Having once determined upon a rational policy of compensation, we believe rapid progress can be made in giving it appropriate legal form and adapting it to our customs and institutions. We should act now and as rapidly as is compatible with the greatness and complexity of the subject and its intimate relation to the prosperity of the employers and workmen of our country.¹⁶¹

The preference for the German system is palpable from the report's findings. The next section discusses developments following the groundwork laid by the Minnesota Commission and the NAM report.

D. The Role of the National Civic Federation

Following the investigations and reporting of the Minnesota Commission Initiative and the NAM group, the National Civic Federation ("NCF") was instrumental in actually drafting early workers' compensation bills. The NCF was organized in around 1900, and was initially formed around a program of conciliation and mediation between large unions and corporations.¹⁶² It was led by executives of very large companies and comprised of business, labor, and public interests.¹⁶³ Samuel Gompers, for example, was a member of the NCF, and the organization had the reputation for both opposing the spread of unionism and supporting "responsible" unions.¹⁶⁴ The NCF's membership was diverse, enormous, and influential:

By 1903 almost one-third of the 367 corporations with a capitalization of more than \$10,000,000 were represented in the National Civic Federation, as were sixteen of the sixty-seven largest railroads in the United States. Labor was also represented by its top leaders. Samuel Gompers was the original First Vice President of the Federation, a position he retained until his death in 1925. John Mitchell of the United Mine Workers was an active member and fulltime head of the Trade Agreements Department from 1908 to 1911. The heads of the major railroad brotherhoods and many A.F.L. international unions were also on the executive committee.¹⁶⁵

The reason this matters is that by 1908 the NCF had established an Industrial Insurance Commission which, while initially somewhat inactive, became much more active in 1909, as NCF

¹⁶¹ *Id.* at 268.

¹⁶² James Weinstein, *Big Business and the Origins of Workmen's Compensation*, 8 LABOR HISTORY 156, 162 (1967).

¹⁶³ *Id.* at 162 citing Gordon M. Jensen, *The National Civic Federation: American Business in An Age of Social Change and Social Reform, 1900-1910* (unpublished Ph.D. dissertation, Princeton University, 1956), 30, 35, 50.

¹⁶⁴ *Id.* citing correspondence between Ralph M. Easley, Isaac N. Seligman, Gertrude Beeks, Charles D. Lithgow and William R. Corwine for lists of contributors to the National Civic Federation in 1909, Box 47, NCF papers; also see Ralph M. Easley to J. G. Schmidlapp, New York, March 24, 1913, Box 50, NCF papers, for list of contributors in 1912.

¹⁶⁵ *Id.*

members came to strongly embrace the principles of workers' compensation.¹⁶⁶ August Belmont Jr., the famous financier, was appointed to head the NCF's "Department on Compensation for Industrial Accidents and their Prevention," and, thereafter, the NCF began to aggressively draft workmen's compensation bills.¹⁶⁷ Shortly after being assigned to the NCF's Department of Compensation, Belmont appointed a bill-drafting committee headed by former New York Commissioner of Labor, and conservative lawyer, P. Tecumseh Sherman.¹⁶⁸ Sherman thought the German workers' compensation system was best, but surmised that, because of that system's comprehensive nature, it would both generate hostility and face constitutional hurdles.¹⁶⁹ Sherman's original draft bill was circulated nationally to "the governors and legislators of all states that had appointed commissions to study compensation, and governors of other states were urged to consider such legislation."¹⁷⁰ The bill, which set out an elective, or voluntary, workers' compensation system for all but extrahazardous employments, elicited opposition from a variety of outside actors. The president of U.S. Steel, Raynall Bolling, for example, favored a universally compulsory system.¹⁷¹ Socialists and progressives favored state, rather than private, insurance funds, and wanted higher benefits.¹⁷² Even within the NCF, Hugh Mercer, who had served as Chair at the second National (Minnesota Commission) Conference in 1910, was an opponent of Sherman's draft.¹⁷³ But Sherman thought Mercer's competing bill (which had been substantially influenced by the progressive Russell Sage Foundation investigators) a radical, expensive preference of only ten states, and believed it should not be brought forward in the interest of supporting only a bill that would be widely accepted and become nationally uniform.¹⁷⁴ By December 1910, the NCF was receiving regular requests for a bill from governors and legislators all over the country.¹⁷⁵ In January 1911, Sherman's bill was approved by the Executive Council of the NCF.¹⁷⁶ Following the amendment of the New York constitution to allow for a workers' compensation law, a debate between competing replacement bills ensued in the New York legislature in which the NCF bill, styled the "McClelland bill," substantially prevailed.¹⁷⁷ Thus a direct line can be traced from the Minnesota Commission, to the NAM report, to the NCF, and finally to the version of the New York workers' compensation statute that was upheld by the U.S. Supreme Court in *White*.

¹⁶⁶ *Id.* at 166 *citing* Jensen, op. cit., 325; Memorandum, n.d., n.p., Box 127, NCF papers.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 168.

¹⁶⁹ *Id. citing* Eleventh Annual Meeting of the National Civic Federation, New York, January 12, 13, 14, 1911 (New York, 1911), 173-174, 184.

¹⁷⁰ *Id.*

¹⁷¹ *Id. citing* Boiling, "Results of Voluntary Relief Plan . . .," loc. cit., 39; Boiling to Gertrude Beeks, New York, February 11, 1911; January 15, 1914, Box 127, NCF papers.

¹⁷² *Id.*

¹⁷³ *Id.* at 168-169.

¹⁷⁴ *Id.* at 169.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 170.

¹⁷⁷ *Id.*

***E. What Did the New York Statute Upheld by the U.S. Supreme Court Provide?*¹⁷⁸**

The New York legislature enacted the statute eventually upheld in *White* on December 16, 1913, and the law went into effect on July 1, 1914. It compensated accidental injuries arising out of and in course of employment, and disease or infection “naturally and unavoidably” resulting from accidental injuries, causing disability for more than two weeks, or death, unless caused by the willful intention of the injured employee to bring about the injury or death of himself or another, or by his intoxication while on duty. As Sherman suggested, the Act was compulsory only with respect to “hazardous employments,” which included construction, maintenance and operation of steam and street railroads; telegraph, telephone, and other electrical construction, installation, operation, or repair; foundries, machine shops, and power plants; stone cutting, crushing, grinding, or dressing; manufactures, tanneries, laundries, printing, and bookbinding; shipbuilding and repair, and the use of vessels in intrastate commerce; work in mines, quarries, tunnels, subways, shaft sinking, etc.; engineering work, and the construction, repair, and demolition of buildings and bridges; lumbering, draying, loading, and unloading, ice harvesting, freight and passenger elevators, etc.

All employees in covered industries were eligible, farm laborers and domestic servants were explicitly excluded from coverage by the statute. Public employment was explicitly covered under the statute. The entire cost of the insurance was born by the employer.

Compensation for death:

(a) \$100 for funeral expenses.¹⁷⁹

(b) To a widow or dependent widower alone, 30% of wages of deceased, 10% additional for each child under 18; dependent orphans under 18 received 15%, and dependent parents, brothers, or sisters received 15%; aggregate payments were in no case to exceed 66 2/3%.

(c) Payments to widows or widowers ceased upon death or remarriage or when dependence of widower ceased, with two years’ compensation on remarriage; payments to children, brothers, and sisters ceased at 18, and to parents when dependence ceased. In computing the above benefits no wages more than \$100 monthly were considered.¹⁸⁰

Compensation for disability:

(a) Medical and surgical treatment and hospital services for 60 days, with costs to be approved by the workers’ compensation commission.

(b) For total disability, 66 2/3% of wages during continuance.

(c) For partial disability, 66 2/3% of wage loss; for specified permanent partial disabilities (mutilations, etc.), 66 2/3% of wages for fixed periods; there was a separate provision for disfigurements.

¹⁷⁸ Summary provided in U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, WORKMEN’S COMPENSATION STATUTES, Bulletin No. 203, *supra.* at 151.

¹⁷⁹ About \$2,500 in 2018 dollars.

¹⁸⁰ The maximum base wage rate was about \$2,500 in 2018 dollars, which means that the maximum benefit (regardless how distributed) was about \$1,667 per month.

The foregoing payments could not be less than \$5 nor more than \$15 per week,¹⁸¹ except that for certain “maimings” the aggregate maximum benefit was capped at \$20.

Awards could be reviewed, at any time, and ended or increased or decreased within the limits fixed depending on the disability status of the claimant.

F. Assessing the Range of Reasonableness

The statute enacted by New York in 1913 was at the conservative (it must be said), English Act end of a workers’ compensation spectrum that had been exhaustively studied on a national level since 1908. The indemnity benefit level, though generally capped at \$15 per week, resembled the structure of the English Act and, for lower income workers, paid 15% more of the average weekly wage than the English Act. Moreover, unlike the situation under many modern American workers’ compensation statutes, compensation was paid for the duration of a disability, and was not terminated arbitrarily after a certain period.¹⁸² Deceased workers’ survivors were compensated on an ongoing basis, not as comprehensively as under the German system, but comparably to the English Act. Though the New York Act failed to pay for ongoing medical treatment necessitated by a work-related injury, the same was true of the English Act, and arguably of the German law.¹⁸³ Ultimately, the New York workers’ compensation statute looked like many workers’ compensation laws throughout the world as they had evolved by the early 20th century. And more importantly than how the statute seems retrospectively to a twenty-first century observer, it undoubtedly seemed reasonable (and like good policy) to a broad swath of contemporaneous experts.¹⁸⁴ The Supreme Court’s condemnation of the New York statute (or its successors in other

¹⁸¹ In 2018 dollars, \$126 per month would have been the minimum benefit and \$378 the maximum benefit. The \$20 maximum benefit where a maiming was involved would have been about \$504 per week in 2018 dollars.

¹⁸² Compare John F. Burton, *Report of the National Commission on Workmen’s Compensation Laws*, 1 WORKMEN’S COMP. L. REV. 361, 363 (1974) (“The main issue for permanent total disability benefits concerns the total sum allowed and the duration of payments. Although there is wide agreement that payments for permanent total disability should be paid for life, we found that 19 States in 1972 failed to comply with that recommended standard. In 15 States, duration of payments was limited to 10 years or less and in 11 States the gross sum payable was less than \$25,000, which is less than the average full-time worker in the United States earns in four years.”).

¹⁸³ Workers in each country were paid for work-related medical injury care under a national health insurance law, and at the time the Minnesota Commission and NAM investigators were doing their work England had not yet enacted such a law. *See supra*. n.133 & 134 and accompanying text.

¹⁸⁴ Following the *Ives* decision, the New York Commission (independently of the NCF) aggressively reopened its earlier investigations on the desirability and design of a workers’ compensation law. The Commission’s account of its deliberations states:

The first and principal report is one of the most extended reports issued by a State commission. Eleven public hearings in various parts of the State, 14 executive sessions of the commission, and numerous meetings of committees and subcommittees indicate something of the activity of the commission in one direction. Inquiries were sent to 1,942 employers reporting accidents to the State department of labor, to 975 reporting accidents to the public-service commission, and to the presidents of 2,331 labor organizations in the State. Several statistical studies were made as to the economic results of accidents and proceedings at law with reference to such accidents; also the cost of industrial accidents to employers and the distribution of such costs to hospitals for fees, insurance premiums, settlements, as damages, etc.

states) as unreasonable would have meant, as a practical matter, condemnation of the very idea of workers' compensation, with few alternative ideas in circulation as to how to replace the insufficient tort system.

The Washington statute upheld in *Mountain Timber* provided fixed monthly benefits for both disability and death that were not based on a percentage of the average weekly wage.¹⁸⁵ The Arizona statute upheld in the *Arizona Copper* cases provided total disability benefits based on fifty-percent of injured worker's average semimonthly earnings and, in the case of partial benefits, for only fifty-percent of injury related reduction in wages, with a lifetime cap on all disability benefits of four-thousand dollars.¹⁸⁶ None of the early statutes provided work-injury medical benefits beyond sixty days. Was this an adequate exchange for the total relinquishment of tort rights? As discussed in Part II, the Supreme Court made no attempt to compare, in quantitative terms, the magnitude of benefits. One might *infer* that anything below fifty-percent of the average wage for ongoing disability might have been problematic for the Court. The complete absence of a death benefit might not have passed muster under the bargain.¹⁸⁷ The important point is that the Supreme Court's silence on the scale of benefits speaks volumes to its likely confidence in the level of sophistication and process that went into creation of the statutes. That sophistication essentially obviated the need for the Court to make any pronouncements on the importance, or constitutional status, of tort rights, and whether those rights could, indeed, simply be swept away.

CONCLUSION

Perhaps some thoughts may now safely be completed. It is unnecessary to say that a state might (without triggering due process concerns) set aside all rules of employer-employee liability without providing a "reasonably just substitute,"¹⁸⁸ *because here, in the New York workers' compensation statute under consideration, there is a reasonably just substitute*. It perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead,¹⁸⁹ *but here something adequate has been set up in their stead*. None of this is to say, that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable,¹⁹⁰ *but here one need*

U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, WORKMEN'S COMPENSATION STATUTES, Bulletin No. 203, *supra*. at 25.

¹⁸⁵ L.1911, c. 74, Sec. 5: In case of death \$20 per month to the surviving spouse; \$5 per month to each surviving child; maximum of \$35 per month (roughly \$900 in 2018 dollars). The same maximum applied to a married injured worker with dependents. For permanent partial disability the worker could receive a maximum of \$1500 (about \$38,000 in 2018 dollars) regardless the duration of the disability.

¹⁸⁶ U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, WORKMEN'S COMPENSATION STATUTES, Bulletin No. 203, *supra*. at 130. The cap would be just over \$100,000 in 2018 dollars.

¹⁸⁷ Here, however, it should be remembered that wrongful death had been extinguished by the common law in the English case *Baker v. Bolton*, 170 Eng. Rep. 1033 (K.B. 1808), and had to be revived in that country by Lord Campbell's Act. Although also revived by statutory intervention in the United States, there is a good deal of variety in the statutes, see Frederick Davis, *Wrongful Death*, 1973 WASH. U. L. Q. 327, 329-331 (1973), and it is difficult to say in general terms whether workers' compensation death benefits in the aggregate represent a windfall or loss to the survivors of victims of work-related injuries.

¹⁸⁸ *See supra*. at 58.

¹⁸⁹ *Id.*

¹⁹⁰ *See supra*. at 60.

not reach the question because no such insignificant or onerous scale is present. How did the Court know the system under consideration was reasonably just, adequate, and provided a scale of compensation that was neither objectionably insignificant nor onerous? The Court did not say (other than perhaps to explain how much better off employees were to be out of the tedious, burdensome, unpredictable litigation system and to not have *all* the loss of an injury fall on them).¹⁹¹ But it seems extremely unlikely the Court was unaware that a massive, national conversation had been underway, during the eight years preceding *White*, conducted among high-ranking business leaders, progressive groups, labor unions, and academics, and that the statute before it was the fruit of those labors. One can perhaps criticize the emerging workers' compensation model as being excessively pro-business, and not in the interest of workers.¹⁹² That view may presume that injured workers with valid tort claims would have sufficiently frequently prevailed under strengthening employer liability statutes¹⁹³ to force employers to invest in safety, ultimately also inuring to the benefit of the victims of pure accident. Such a conclusion is easy to reach in hindsight, but probably misapprehends the urgency and intensity of the work injury problem. Despite all of this, it cannot be doubted that a compromise emerged from significant transoceanic process, and that the Court understood this was the case.

The problem *White* leaves to posterity is one of unarticulated boundaries. Boundaries for employee benefits as a substitute for tort are said to exist, but are never delimited except by inference. A "substantial expression of the impairment of earning capacity,"¹⁹⁴ remains in the eye of beholder. Of course, as Professor Nachbar recently emphasized, throughout the *Lochner* era the Court approached the question of deprivation of vested rights "from the perspective of divining the nature of the state's interest in regulation, not the nature of the individual's rights to liberty and property,"¹⁹⁵ not to mention personal security. Properly understood in constitutional terms, the foundational workers' compensation cases decided the power of a state, as limited by the 14th amendment, to compel employers to provide insurance for their workers. The question of infringement on individual employee rights was peripheral, though considered. It is difficult to fault the Court for not precisely answering questions delineating the scope of individual rights (in this case, the common law tort right to a remedy for personal injury that workers' compensation was replacing) when it had not really been asked those questions, and had only just begun to refine a language of individual fundamental rights.¹⁹⁶

¹⁹¹ See *supra*. n.59 and accompanying text.

¹⁹² See Weinstein, *Big Business*, *supra*. at 169 (characterizing 1911 socialist leader Morris Hillquit's description of the NCF's model workers' compensation statute: 'the shrewdest [game] yet devised by the employers of any country.' It took 'nothing from capital'; it gave 'nothing to labor.' But it 'does it all with such an appearance of boundless generosity' that 'some of the more guileless diplomats in the labor movement are actually overwhelmed by it' and it was devised to forestall 'legislation which will sweep away all the defenses of the employer.').; see also Martha T. McCluskey, *The Illusion of efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 675-676 (1998) (criticizing a simplistic view of the quid pro quo and noting that, among other things, "some business leaders viewed workers' compensation as a compromise that offered some short-term sacrifice of employer profit in exchange for longer term protection of capital from socialist organizing in the United States, as well as protection from proposals to copy the more comprehensive German model of disability compensation or to expand employer tort liability.")

¹⁹³ An "employer liability" statute is one which abolishes certain common law affirmative defenses—the fellow servant rule, assumption of the risk, or contributory negligence—to common law tort actions. See generally *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 49 (1912).

¹⁹⁴ See *supra*. n.156 and accompanying text.

¹⁹⁵ Nachbar, *The Rationality of Rational Basis Review*, *supra*. n.34, at 1641.

¹⁹⁶ *Id.* at 1640.

