Articles

TORT REFORM, SEPARATION OF POWERS, AND THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910

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I. INTRODUCTION

The tort system in this country has received considerable scrutiny over the past several decades. Attempts at reform have waxed and waned; yet they have persisted in one area or another since the early 1970's. Initially, dissatisfaction with the automobile accident reparations system brought about efforts to compensate less-than-seriously injured traffic victims without regard to fault and to eliminate these cases from the tort-liability insurance system.[1] Subsequently, in the 1970's and 1980's, legislatures undertook to modify judge-made tort law governing product manufacturers[2] and health-care providers,[3] along with modifications to the new liability exposure faced by governmental entities resulting from judicial abolition of immunity.[4] In addition, the manner in which damages were assessed—both compensatory and punitive—were examined with an eye toward change. In fact, there hardly has been a moment within the past twenty-five years during which serious agitation for change, either at the state or federal level, or both, has not been extant. Law reform, however, is not merely a matter of a disinterested search for the best change; it is essentially political, and what

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1. *See* Roger C. Henderson, *No-Fault Insurance for Automobile Accidents: Status and Effect in the United States*, 56 OR. L. REV. 287 (1977).

2. *See* Terry M. Dworkin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602, 604 n. 12 (1983) (citing statutes from over two-thirds of the states adopting product liability reforms from 1977 to 1983).

3. *See* Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 511–40 (1989).

4. *See* 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT 182 (2d ed. 1992).

would be best from some abstract legal perspective does not always comport with what appears best, or even possible, from a political perspective.[5]

Proponents of reform do not necessarily have eleemosynary motives and not all reform efforts, particularly in the health-care provider area, have been salutary. But even when they have been, most have faced considerable opposition, particularly from the plaintiffs' trial bar and, of late, self-ordained consumer groups. What has emerged from the hurly-burly of the legislative process, when anything at all has emerged, has been, in a number of instances, far from perfect. Sometimes, for example in the area of auto accidents, pre-existing problems in the reparation system have been exacerbated by enactment of poorly designed reforms or ill-advised compromises.[6] The resulting negative publicity has tended to overshadow the fact that these systemic problems have been eliminated or reduced following the enactment of better designed reforms in other jurisdictions.[7] Nevertheless, the results of tort reform have been mixed, at best.

Despite the mixed results, or perhaps because of them, proposals for changing the tort-liability insurance system are still very much in vogue as the twentieth century comes to a close. Moreover, they are unlikely to abate until the concerns underlying the calls for reform are accommodated. Perhaps this state of affairs is as it should be because, as observed by the late Professor Grant Gilmore:

> There is no point in arguing with a revolution. It may be that whatever can be pulled down ought to be pulled down; if it is no longer strong enough to withstand assault, it should be replaced by something that is. In this sense any successful revolution is self-justifying: by its success it has revealed the inadequacies of what it has replaced. We may have a romantic attachment to the old regime but we should not let it cloud our thought about present reality.[8]

The reality is that the rules governing the recovery of damages by accident victims and the means by which those damages are measured are under siege and Arizona tort law is no exception, as recent events attest.

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5. *See Remarks of Grant Gilmore, Edited Transcript of AALS–AEA Conference on Products Liability*, 38 U. CHI. L. REV. 117, 123 (Henry G. Manne ed., 1970).

6. One goal of no-fault auto insurance is to reduce insurance premium rates for bodily injury arising from auto accidents. Those states that opted to add a first-party no-fault bodily injury coverage without any serious attempt to restrict third-party tort actions arising from auto accidents for the same injuries have seen their total bodily injury premiums, which would include bodily injury liability coverages as well as no-fault, rise markedly in comparison with states that either did not enact no-fault laws or that enacted no-fault laws with an effective restriction on third-party tort actions. *See* U.S. Dep't Of Transp., Pub. No. 30–84–20, *Compensating Auto Accident Victims: A Follow-Up Report On No-Fault Auto Insurance Experiences* 4, 65–72 (May 1985) [hereinafter *Accident Victims Report*]; Jeffrey O'Connell & Janet Beck, *An Update of the Surveys on the Operation of No-Fault Auto Laws*, 1979 INS. L. J. 129, 133.

7. For example, Massachusetts, the first state to adopt a no-fault auto insurance law, has a weak restriction on third-party tort claims arising from motor vehicle accidents and this deficiency, among others, continues to generate problems regarding premium rates which has been a constant source of negative publicity. *See, e.g.*, Neil McGhee, *Mass. Governor Seeks Reform of Auto Coverage*, NAT'L UNDERWRITER PROP. & CASUALTY/RISK & BENEFITS MGMT. EDITION, March 16, 1992, at 4, 7. Those states that avoided this problem have enjoyed much lower rates. *See Accident Victims Report, supra* note 6.

8. Grant Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 116 (1970).

In 1973 the Arizona House of Representatives approved a bill[9] that would have eliminated from the tort-liability insurance system all but the most serious cases of bodily injury arising from motor vehicle accidents.[10] Although the bill was never reported for a floor vote in the Arizona Senate, it coincided with the onset of a national concern over deficiencies in the motor vehicle accident reparations system. In the mid-1970's, in response to a perceived medical malpractice insurance crisis,[11] the Arizona Legislature enacted a number of statutes affecting the rights of patients to bring tort actions against health-care providers.[12] Efforts to modify medical malpractice law were renewed, again with some success, in the late 1980's when health-care providers found themselves subject to a new round of rapidly escalating liability insurance premiums.[13] During these two decades statutes dealing with product liability[14] and governmental tort immunity[15] also were enacted.

Now, in the early 1990's, proposed legislation on no-fault auto insurance again is being considered seriously,[16] as are other measures which would affect governmental tort liability.[17] Such proposals, along with other legislative attempts at reform that are sure to follow,[18] are worthy of analysis, but such analysis is not the purpose of this Article. Its purpose, rather, is to consider a more fundamental issue that must be addressed by those involved in tort reform in Arizona.

People who become involved in the various efforts at tort reform in Arizona soon learn that there might be some unusual limitations on the reform that can be accomplished by legislative action. All state constitutions, like the Federal Constitution, contain provisions prohibiting the government from denying due process and equal treatment to those subject to its provisions. A number of state constitutions also have provisions guaranteeing a remedy for wrongfully

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9. S. Res. 2009, 31st Leg., 1st Sess. (1973).

10. The proposed legislation was based upon the Uniform Motor Vehicle Accident Reparations Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1972. *See* 14 U.L.A. 35 (1990).

11. *See* Roger C. Henderson, *Designing a Responsible Periodic-Payment System for Tort Awards: Arizona Enacts a Prototype*, 32 ARIZ. L. REV. 21 n. 3 (1990).

12. *See id.* at 39–40 nn. 105–06.

13. *See id.* at 21 n.3.

14. Act of April 21, 1978, ch. 19, 1978 Ariz. Sess. Laws 43.

15. Act of April 25, 1984, ch. 285, 1985 Ariz. Sess. Laws 1091.

16. In addition to no-fault bills introduced in the Arizona Legislature, an initiative petition was successful in placing a proposed no-fault auto insurance plan on the ballot in the November 1990 general election. The initiative failed to pass.

17. Governor Fife Symington established a Task Force on Tort Reform to study various aspects of governmental immunity and report to the Governor with options no later than July 1, 1992. Executive Order No. 92–5 (Jan. 1992). The report of the Task Force led to legislation in the 1993 session narrowing the liability exposure of governmental entities. *See infra* note 18.

18. During the 1993 legislative session, as this article was being written, a number of changes regarding tort law were enacted by the Arizona Legislature. Among others, the legislature enacted a twelve year statute of repose, narrowed the liability exposure of governmental entities and occupiers of land open to recreational users, provided that collateral sources may be considered by the jury in all personal injury actions, created the right to a lien by health insurers on their insured's tort recoveries, established a right of subrogation by health insurers, altered the physician-patient communication privilege, changed the pure comparative fault system to a modified system where a claimant may only recover if his or her negligence is less than that of the defendants, and extended the periodic payment of judgments system from medical malpractice situations to all personal injury claims involving future damages. *See* S.B. 1055, 41st Leg., 1st Sess., 1993 Ariz. Sess. Laws 90.

inflicted harm. None of these provisions, however, necessarily guarantees a tort remedy, much less guarantees what the common law may have come to recognize in the way of money damages. In the jurisdictions that only have these types of provisions, the legislatures are free to modify the common law bases of liability and the measures of damages by enacting statutory compensation systems that are deemed to be reasonable substitutes for the judge-made remedies. In contrast, Arizona is one of the few states[19] with specific constitutional provisions affecting the power of the legislature to modify actions for personal injury or death and the amount of damages that are recoverable.

These specific constitutional provisions, which act to separate the power of the legislature from that of the courts, are found in two different places in the Arizona Constitution. Section 31 of Article II, the article entitled Declaration of Rights, provides: "No law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person." Section 6 of Article XVIII, entitled Labor, provides: "The right of action to recover damages for injuries shall never be abrogated, and the amount shall not be subject to any statutory limitation." Placed in the Arizona Constitution nearly a century ago, these provisions loom large in the consideration of any tort reform proposal that would significantly alter the system by which accident victims are compensated in this state.

Determination of the meaning of these two provisions is a critical prerequisite to the understanding of the legality of any legislative displacement of common law tort liability, as in some no-fault automobile insurance plans, as well as the validity of any legislative modifications of the measure of damages to be recovered for tortious harm in general. The meaning of the provisions must be known before a judgment can be made about what the legislature may do in the way of tort reform. Despite the need for an authoritative interpretation, however, the courts of Arizona have yet to provide a clear understanding of how these provisions came into existence or what the framers intended in the way of separation of powers between the judicial and legislative branches of government. Therein lies the subject of this Article. How did Section 31 of Article II and Section 6 of Article XVIII of the Arizona Constitution come into being and how should they be interpreted? And, given that interpretation, does the Arizona Legislature have the power to engage in any meaningful tort reform in this state?

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19. For other states, see KY. CONST. § 54 ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."); OHIO CONST. art. I, § 19a ("The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law."); and PA. CONST. art. 3, §18, which states:

> The General Assembly may enact laws requiring the payment by employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property ....

Id.

Although a fair amount has been written about the Arizona Constitutional Convention of 1910,[20] the body that framed the two provisions in question, little has been written about the institutional history of these and other provisions in the constitution that may affect the power of the legislature to alter tort law as developed by the courts. Moreover, to date, little has been written about the events that preceded the convention, particularly the process by which delegates were elected. The issues that concerned and were debated by persons who wanted to be delegates and, presumably, the other citizens of the soon-to-be state should inform any attempt to understand what transpired during the convention. In turn, what transpired during the convention is indispensable to determining the meaning that should be given to the various provisions that were actually adopted. Given the stakes, it is important that we know considerably more about the reasons why and how the limitations on tort reform were placed in the Arizona Constitution. It is the aim of this Article to provide as much of that information as possible.

With this aim in mind, the author examined all of the newspapers that were published in the Territory of Arizona from June through December of 1910 of which copies still exist. These give a good account of the political activity in the territory during the period after President Taft signed the statehood enabling legislation on June 20, 1910 until the end of the constitutional convention on December 9 of the same year. The second section of this Article reviews the pertinent events of this period as set forth in these news and other accounts, and reveals some interesting information about the aspirations and concerns of those who would be drafting the new constitution. The third section addresses some aspects of territorial tort law that may have affected the deliberations of the convention. The fourth section examines the origins of the constitutional provisions pertaining to tort law and traces the process by which the various proposals at the Constitutional Convention of 1910 came to be adopted into the Arizona Constitution. The fifth section evaluates the existing judicial interpretations in light of what the author concludes may be supported by history and, lastly, some thoughts concerning the efficacy of these interpretations are offered.

In the final analysis, what hangs in the balance is the proper allocation of power between the judicial and legislative branches of government to decide how accident victims must be treated in Arizona insofar as any legally mandated system of reparations is concerned. As reform efforts persist, it is abundantly clear that the Supreme Court of Arizona will be called upon to articulate that balance. It is hoped that this Article will help to achieve a fair and just resolution

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20. *See, e.g.*, BERT M. FIREMAN, ARIZONA: HISTORIC LAND 184–97 (1982); JOHN S. GOFF, ARIZONA CIVILIZATION 43–54 (1970); GEORGE H. KELLY, ARIZONA 1864–1912: LEGISLATIVE HISTORY 272–83 (1926); FRANK C. LOCKWOOD, PIONEER DAYS IN ARIZONA 368–78 (1932); 2 JAMES H. MCCLINTOCK, ARIZONA: PREHISTORIC, ABORIGINAL, PIONEER, MODERN 361–74 (1916); J. MORRIS RICHARDS, BIRTH OF ARIZONA: THE BABY STATE (1940); 2 EDWARD H. PEPLOW, JR., HISTORY OF ARIZONA 1–29 (1958); 2 WARD R. ADAMS, HISTORY OF ARIZONA 208–25 (Richard E. Sloan, ed., 1930); DONALD R. VAN PETTEN, THE CONSTITUTION AND GOVERNMENT OF ARIZONA 17–29 (1952); JAY J. WAGONER, ARIZONA TERRITORY 1863–1912: A POLITICAL HISTORY 457–75 (1970); RUFUS K. WYLLYS, ARIZONA: THE HISTORY OF A FRONTIER STATE 307–10 (1950); Gordon M. Bakken, *The Arizona Constitutional Convention of 1910*, 1978 ARIZ. ST. L.J. 1; John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1 (1988); *see also* Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115 (1988).

of the issue based upon an accurate determination of the meaning of Section 31 of Article II and Section 6 of Article XVIII of the Arizona Constitution.

II. EVENTS PRECEDING THE CONSTITUTIONAL CONVENTION OF 1910

A. From Territorial Status to Statehood

It was a long struggle from February 24, 1863 when President Abraham Lincoln approved the Arizona Territorial Act[21] to June 20, 1910 when President William Howard Taft signed the statehood enabling legislation.[22] Almost from the beginning, the people of the territory felt strongly about achieving statehood, and for good reason.[23] Although the territorial legislature was elected and could pass laws, this authority was limited far more than that of a state legislature. Moreover, Congress could always, and sometimes did, overrule what was done by the territorial legislature. Although the territory had an elected delegate to Congress, the individual was just that, with no power to vote or otherwise legally affect what happened in the territory.[24] About all the delegate could do was to see that bills were introduced, make speeches on the floor, and lobby.[25] To add to the political impotence of Arizonans at the national level, the citizens of the territory were not even eligible to vote in presidential elections. Things were not much better inside the territory either.

The governor and the judges of the supreme court of the territory, as well as many other officials, were appointed by the President of the United States. This state of affairs added tension because of the political complexion of the territory. In its early days, the position of governor was in the political patronage system, and was almost always filled by appointment of someone from outside the territory.[26] Even after governors were being appointed from among the territorial citizens, the situation did not improve much. In the two decades spanning the turn of the century, the non-Native American population of Arizona almost tripled from approximately 60,000 to nearly 180,000.[27] Much of the increase consisted of the laborers who came to work in the mines and on the

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21. Act of Feb. 24, 1863, ch. 56, 12 Stat. 664.
22. Act of June 20, 1910, ch. 310, 36 Stat. 557.
23. *See* GOFF, *supra* note 20, at 49–50; LOCKWOOD, *supra* note 20, at 368–74; WYLLYS, *supra* note 20, at 295–305.
24. By 1874 Congress had provided:

> Every territory shall have the right to send a Delegate to the House of Representatives of the United States, to serve during each Congress, who shall be elected by the voters in the Territory qualified to elect members of the legislative assembly thereof. The person having the greatest number of votes shall be declared by the governor duly elected, and a certificate shall be given accordingly. Every such Delegate shall have a seat in the House of Representatives, with the right of debating, but not of voting.

Act of Dec. 1, 1873, ch. 1, § 1862, 18 Stat. 329.
25. *Id.*
26. Of the seventeen territorial governors (only sixteen different men actually served in this position as N.O. Murphy was appointed twice), all but one of the first nine appointments were from outside the territory. The first bona fide territorial resident to be appointed was Lewis Wofley, the eighth governor. He was a civil engineer and surveyor who had made his home in Tucson for about six years prior to his appointment and served from 1889 to 1890. *See* 2 JOHN S. GOFF, ARIZONA TERRITORIAL OFFICIALS–THE GOVERNORS 108–117 (1978); KELLY, *supra* note 20, at 132–46; 2 MCCLINTOCK, *supra* note 20, at 339–41.
27. HENRY P. WALKER & DON BUFKIN, HISTORICAL ATLAS OF ARIZONA 61 (1979).

railroads.[28] At the time, laborers usually believed their interests would be better served by the Democratic Party. Consequently, during this period there was a decided shift towards the Democratic Party in Arizona while the country as a whole continued, for the most part, to elect a series of Republican presidents.[29] Thus, the territorial legislature was usually controlled by the Democrats, especially after 1890, while the governor and other officials appointed by the President were usually Republicans.

On the other hand, Ralph Cameron, the elected territorial delegate to Congress at the time the statehood legislation was passed was a Republican who had campaigned on a promise to get a statehood bill passed or never again to seek the support of Arizona voters.[30] His election, however, was apparently an exercise in political expediency by the Democrats that voted for him because the Democrats swept every state-wide elective office in the first election after statehood was achieved in 1912.[31]

Although there was strong bipartisan support for statehood, this spirit of cooperation did not carry over to day-to-day intrastate politics. For example, in 1901, during the Twenty-first Territorial Legislature,[32] the Democratic President of the Council, the territorial equivalent of a senate, introduced bills that restricted the governor's power to remove his own appointees[33] and authorized private citizens to sue to recover monies illegally paid by territorial officials.[34] Only after a bruising legislative battle along partisan lines were the proposals defeated.[35] Again, in 1909, the predominantly Democratic Twenty-fifth Territorial Legislature[36] passed bills over the governor's veto that abolished the

28. For example, the populations of Cochise, Gila, and Graham (which included what is now Greenlee County) counties increased 498%, 808%, and 423%, respectively, from 1890 to 1910. Cochise County went from the fourth most populous county to the county with the largest population, surpassing Maricopa, Pima, and Yavapai counties during this period. *Id.* Each of these counties contained significant mining operations and the Southern Pacific Railroad used Cochise County as a staging area as it began to extend its line from El Paso across Arizona to California.

29. From 1863 to 1912, the period during which Arizona was a territory, Grover Cleveland was the only Democrat to be elected President of the United States. He served two terms, 1884 to 1888 and 1892 to 1896. THE WORLD ALMANAC 103, 464 (1993).

30. *See* THE ARIZONA REPUBLICAN, Sept. 11, 1908, at 1, 7.

31. 2 MCCLINTOCK, *supra* note 20, at 369.

32. In the Twenty-first Territorial Legislature there were a total of 27 Democrats and 9 Republicans, with the Democrats enjoying an 8 to 4 advantage in the Council and an 19 to 5 advantage in the Assembly. JAMES H. MCCLINTOCK, ARIZONA'S TWENTY-FIRST LEGISLATURE 11, 27 (1901).

33. REV. STAT. OF ARIZ. § 107 (1901).

34. REV. STAT. OF ARIZ. § 112 (1901).

35. After Governor N.O. Murphy vetoed both bills, the Council overrode the vetoes. However, the bills were tabled in a parliamentary maneuver in the Assembly. *See* THE ARIZONA REPUBLICAN, Mar. 6, 1901, at 1; *id.*, Mar. 7, 1901, at 1; *id.*, Mar. 8, 1901, at 1, 3; *id.*, Mar. 13, 1901, at 1; *id.*, Mar. 14, 1901, at 1; *id.*, Mar. 15, 1901, at 1, 6; *id.*, Mar. 16, 1901, at 1. In a compromise, a modified version of the bill authorizing private actions to recover public monies illegally expended eventually was passed and signed by the governor in the last days of the session. REV. STAT. OF ARIZ. § 129 (1901). *See* JOURNALS OF THE TWENTY-FIRST LEGISLATIVE ASSEMBLY OF THE TERRITORY OF ARIZONA 258 (1901) [hereinafter JOURNALS I]; *see also* THE ARIZONA REPUBLICAN, Mar. 19, 1901, at 1.

36. There were 10 Democrats and 2 Republicans in the Council and 17 Democrats and 7 Republicans in the Assembly. Although there were 13 counties in Arizona by this time, Pima and Santa Cruz counties were represented by one councilman. *See 25th Legislative Assembly, Arizona,* THE ARIZONA REPUBLICAN, Nov. 25, 1908, at 9.

Arizona Rangers as part of the executive branch[37] and the Office of Public Examiner,[38] as well as a bill that established an English literacy requirement for voters.[39] The first two bills were a direct challenge to the political power of the Republican governor while the latter was primarily aimed at Hispanic voters, who were predominantly Republican at that time.[40]

Nonetheless, once Arizona was established in 1863 as a separate territory from that of New Mexico, settlement and development of this area of the country was inevitable. And with this settlement and growth, it was only a matter of time before statehood would be achieved. The creation of the Arizona territory led to the establishment of a government that was more in tune with the needs and aspirations of citizens who resided in what had been the western half of the New Mexico territory. Santa Fe was the territorial capital of New Mexico prior to 1863 and it was too far removed from the western half of its jurisdiction for effective government. This was particularly true after the land that was acquired in the Gadsden Purchase in 1853 was added to the New Mexico territory. At that time Tucson, with a population that probably did not exceed five or six hundred, was the only settlement between Santa Fe and the California coast that could plausibly claim to be a town.[41]

Even after Arizona was established as a separate territory, it was relatively ignored so long as gold seekers and settlers had their sights on California, but with the end of the War Between the States the southwest began to look more attractive and its exploration and settlement began in earnest.[42] The lonely prospector with his only investment in a burro, a few tools, and some grub was to give way to infusions of capital from the east coast and from as far away as Scotland.[43] Mining for precious metals was eclipsed by copper mining as deposits were discovered and claims were filed, purchased, and consolidated by investment groups.[44] New methods of extraction required more workers to produce the large amounts of ore involved. This need led to more immigration from England and Europe, as well as from Mexico.[45] In the meantime, Mormon

37. Act effective Feb. 15, 1909, ch. 4, 1909 Ariz. Sess. Laws 5. The Legislature went on to provide that the sheriff of any county could, with the approval of the Board of Supervisors, appoint Ranger Deputies, but that the appointments "shall be based upon merit alone without reference to politics or party affiliation, and any Ranger Deputy attempting to use his official position to coerce or intimidate voters shall be summarily removed from office." Act effective March 11, 1909, ch. 14, § 4, 1909 Ariz. Sess. Laws 21.

38. Act effective Feb. 15, 1909, ch. 5, 1909 Ariz. Sess. Laws 6.

39. Act effective Mar. 10, 1909, ch. 13, 1909 Ariz. Sess. Laws 18. This was popularly referred to as an "educational requirement."

40. 2 MCCLINTOCK, *supra* note 20, at 358.

41. According to one source:

> The first official census of Arizona was taken in 1860, when Arizona County ... was part of the territory of New Mexico. Before that time, population figures were pure estimates. Between 1846 and 1853 Tucson was estimated to have about 500 souls. In 1857 Tubac was credited with 500 inhabitants. The 1860 census showed that Tucson, with 620 people, was by far the largest settlement and that Tubac, with 163, was the second largest. In both cases outlying settlements were enumerated separately. For example, San Xavier, eight miles south of Tucson, had 99 inhabitants, and various mines and farming communities that used the Tubac post office accounted for 141 persons.

WALKER & BUFKIN, *supra* note 27, at 60.

42. *See* WYLLYS, *supra* note 20, at 213.

43. *See* FIREMAN, *supra* note 20, at 153–54.

44. *See id.* at 157; *see also* LOCKWOOD, *supra* note 20, at 214–17.

45. *See* FIREMAN, *supra* note 20, at 158; WYLLYS, *supra* note 20, at 289.

settlers were crossing the Colorado River at Lee's Ferry to establish a series of settlements south along the Little Colorado and later to develop agricultural sites in the Salt River Valley and in other areas in southeast Arizona.[46] Cattle and sheep ranching[47] and timbering[48] also began to play an important role in the economic development of the territory.

All of this activity, along with the construction of two major rail lines that traversed the southern and the northern expanses of the territory,[49] was accomplished in large part within three decades after the territorial government became fully operational. What began in 1864 as four counties—Mohave, Yuma, Yavapai, and Pima—had been divided into thirteen counties by the turn of the century.[50] The area was coming of age as territorial government provided the stability and opportunity for Arizona to move from an unpopulated and undeveloped frontier to a vibrant area of the country whose demand for statehood could no longer be ignored.

Extolling the virtues of what he hoped would be represented by the forty-seventh star of the American flag, Governor Richard E. Sloan pointed out a number of interesting facts about the territory in the September, 1910 issue of Sunset Magazine.[51] Arizona had grown from a population of less than 4000 at the time it became a territory to one that probably exceeded 200,000 at the time the article was written.[52] In size, it exceeded all but Texas, California, Montana and New Mexico.[53] Over 2000 miles of rail had been laid, and more was under construction.[54] Roosevelt Dam was nearly finished and would provide irrigation for approximately one-quarter million acres, not to mention the generation of thousands of watts of electrical power.[55] Other reclamation projects were in the works which would provide additional irrigation for much of the one million acres of agricultural lands already in production.[56] Bisbee led the world in copper production from one site with 274 million pounds of finished copper in 1907, while the territorial copper mines as a whole led all other states and territories.[57] Phoenix, Tucson, Douglas, Bisbee, Prescott, Globe, and Clifton were the principal towns, in addition to constantly growing numbers of smaller communities throughout the territory.[58] The territory maintained a university and two normal schools, along with a new capitol building and, for the time, other modern, well-equipped institutions.[59] There were more than sixty daily, weekly, and monthly

46. *See* WYLLYS, *supra* note 20, at 214–18.
47. *See id.* at 239–55.
48. *See id.* at 287–88.
49. *See id.* at 273–77.
50. *See* WALKER & BUFKIN, *supra* note 27, at 30–32.
51. Richard E. Sloan, *The Forty-Seventh Star*, 25 SUNSET MAGAZINE, Sept. 1910, at 267.
52. *Id.* at 267–69. The figure of 4000 cited by Governor Sloan did not include Native Americans, but the 200,000 estimate mentioned by him probably did. Apparently the early census figures did not include Native Americans, but at least by 1890 a separate count was taken and by 1910 Native Americans were included in the general census. The census of 1910 for Arizona showed a population of 204, 354, including Native Americans. WALKER & BUFKIN, *supra* note 27, at 61.
53. Sloan, *supra* note 51, at 269.
54. *Id.* at 272.
55. *Id.* at 271.
56. *Id.* at 271–72.
57. *Id.* at 270.
58. *Id.* at 272.
59. *Id.*

periodicals,[60] at least ten of which were published in Cochise County alone.[61] A number of these publications gave extensive coverage to national and international events, as well as to territorial and local matters.[62] In short, the days of train robberies and saloon fights were coming to a close as the dream of statehood was finally being achieved through the impressive gains that had been made. Although denied the forty-seventh star by New Mexico,[63] Arizona did achieve the distinction of becoming the forty-eighth state.[64]

B. The Politics of Selecting Delegates to the Constitutional Convention of 1910

After forty years of agitation, including one abortive constitutional convention in 1891[65] and a later political battle to keep from being swallowed up in a move to meld the territories of New Mexico and Arizona into one state,[66] Congress passed the Organic Act in June of 1910 which set out the conditions for statehood.[67] This act authorized the formation of a constitutional convention consisting of fifty-two delegates.[68] The delegates were to be apportioned among the several counties of the territory in accordance with the spread of the voting population indicated by the vote cast at the election for Delegate in Congress in 1908.[69] Although the territorial legislature of 1909 had created a fourteenth county out of the eastern portion of Graham County that was named after an early territorial pioneer, Mace Greenlee,[70] the new county government was not scheduled to be organized until after the delegates to the constitutional con-

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60. *Id.*

61. These included the *Arizona Range News, Benson Press, Bisbee Daily Review, Bisbee Evening Miner, Cochise County Press, Courtland Arizonan, Douglas Daily Dispatch, Douglas International, Tombstone Epitaph,* and *Tombstone Prospector. See infra* note 62.

62. The author was able to locate copies of nearly 40 of the newspapers that existed in Arizona in 1910 and was impressed with the broad news coverage they provided to their readers. Although most copies are on microfilm, there are a number of originals still in existence. Most of the copies may be found in the Arizona Historical Society Library and University of Arizona Library in Tucson or at the Department of Library, Archives and Public Records at the State Capitol in Phoenix.

63. New Mexico was admitted to the Union on January 6, 1912. *See* Proclamation by the President of the United States of America, 37 Stat. 1723 (1912).

64. Almost a half century would pass before another state would be admitted to the union. Alaska and Hawaii became the forty-ninth and fiftieth states, respectively, in 1959. Proclamation by the President of the United States of America, 73 Stat. c16, c74–75 (1959).

65. The proposed constitution that emerged from the 1891 convention was approved by the United States House of Representatives in 1892, but the statehood bill was never reported out of the Senate Committee on Territories. The facts that the Senate was controlled by the Republicans and that the admission of Arizona would risk the addition of two more Democrats to that body played a part in the failure to gain statehood in 1892, but it was probably not as important as the inclusion in the proposed constitution of a provision making silver, in addition to gold, legal tender for all debts and obligations contracted in Arizona. Aside from the fact that this provision would be *ultra vires* by virtue of the Federal Constitution, the proposed constitution contained more than even the Cleveland Democrats would support when both houses of Congress and the Presidency were in the hands of the Democrats in 1893. *See* WAGONER, *supra* note 20, at 289–91.

66. This move was alleged to be motivated by the Republicans in Congress. New Mexico had twice as many people as Arizona and was predominantly Republican, thus assuring a better chance of electing Republicans to Congress. *See* 2 MCCLINTOCK, *supra* note 20, at 363–65; WAGONER, *supra* note 20, at 430–39.

67. Act of June 20, 1910, ch. 310, 36 Stat. 557.

68. *Id.*, § 19, 36 Stat. 557.

69. *Id.*

70. Act of Mar. 10, 1909, ch. 21, 1909 Ariz. Sess. Laws 43.

vention were required to be selected and the convention convened.[71] Thus, the fifty-two positions for delegate were distributed among the thirteen counties that were functioning at the time in the following manner:[72]

County	No. of Delegates
Apache	1
Cochise	10
Coconino	2
Gila	5
Graham	5
Maricopa	9
Mohave	1
Navajo	2
Pima	5
Pinal	2
Santa Cruz	1
Yavapai	6
Yuma	3
Total	52

The enabling act also prescribed the electoral process for delegates.[73] The governor of the territory was to issue a proclamation ordering an election of the delegates not earlier than sixty nor later than ninety days from June 20, 1910, the date President Taft signed the Organic Act. The election was to be conducted according to the territorial laws governing the last general election, which was in 1908. This provision had two significant effects.

First, the Twenty-fifth Territorial Legislature meeting in 1909 had changed the electoral laws that governed the 1908 election[74] from a county convention nominating system to the direct selection of party nominees through a primary

71. The statutory authority to register voters, call, and hold a general election in Greenlee County could not be exercised until the first Monday in September. *Id.*, § 5, 1909 Ariz. Sess. Laws 45. The election of delegates to the constitutional convention was required to be held no later than 90 days after the enabling legislation was signed by President Taft, which was June 20, 1910, and the convention was to convene on the fourth Monday after the election. Act of June 20, 1910, ch. 310, § 19, 36 Stat. 557.

72. Apportionment was arrived at by dividing the total vote cast in the 1908 election for Delegate in Congress by 52, which resulted in a unit of apportionment of 532. The total vote in each of the 13 counties was then divided by this unit. Whenever there was a fraction and the fraction exceeded one-half the unit, a delegate was added to the apportionment. Whenever the fraction was less than one-half the unit, no additional delegate was given. This process resulted in the allocation of 51 delegates. The fifty-second delegate was awarded to the county whose fraction approached nearest one-half the unit. The governor's announcement regarding apportionment did not reveal which county received the fifty-second delegate, nor did the newspapers reveal that information. *See Apportionment is Made Public,* ARIZONA GAZETTE, June 25, 1910, at 1.

73. Act of June 20, 1910, ch. 310, § 19, 36 Stat. 557.

74. The 1908 general election was regulated by the election laws passed by the Twenty-first Territorial Legislature as part of a general code revision in 1901. *See* REV. STAT. OF ARIZ. §§ 2272–2443 (1901).

election.[75] Under the county convention system, a particular political party in a county would convene its members to nominate candidates for whatever offices were to be filled through a general election. In contrast, under the 1909 law candidates for their party's nomination could qualify by filing a petition with the requisite number of signatures. A primary election then would determine who would represent a particular party in the general election. Thus, the direct election process would have provided greater opportunities and independence for would-be delegates to the constitutional convention as compared to the county convention system, a system that gave more control to the politically powerful in the party.[76] However, the Republican Congress had seen to it that the direct primary system was not to be the process for nominating candidates for delegate to the constitutional convention.[77] Consequently, as will be seen below, the county convention system, under which the candidates for delegate to the constitutional convention were actually nominated, resulted in highly partisan contests by candidates pledged to particular political platforms adopted at those conventions.[78]

The Congressional requirement that the 1908 territorial election laws apply to the selection of constitutional convention delegates, however, had a second, more salutary effect. In 1909 the territorial legislature passed an English literacy requirement as a voter qualification.[79] Had this provision been applicable to the 1910 election, those many Hispanic residents and European immigrants who were not literate in English would have been prevented from voting. Fortunately, by application of the 1908 law such persons were able to participate in the selection of delegates.[80] Had they been precluded from participation, the outcome of the election might well have been different.[81]

Amid celebrations throughout the territory, Governor Richard E. Sloan initiated the election process when he issued the proclamation establishing the twelfth day of September, 1910 as the date for choosing delegates to the constitu-

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75. Act of Mar. 10, 1909, ch. 24, 1909 Ariz. Sess. Laws 60.

76. Provision was also made in the 1901 election laws for nominations by certificate, that is, petition, but as a practical matter such a nominee would not be part of the party process where county party conventions were the main means of nominating candidates. *See* REV. STAT. OF ARIZ. §§ 2320–2324 (1901).

77. The direct primary system had already proved to be popular with Arizona voters. In 1905 the Twenty-third Territorial Legislature provided for primaries in choosing candidates for city, county, and precinct officers and by 1910 some elections had been held under this system. *See Douglas will Hold Election to Name Delegates*, BISBEE DAILY REVIEW, July 13, 1910, at 3. For correspondence between the Mohave County District Attorney Office and the Attorney General of Arizona concerning whether either the 1901 law or the 1905 law applied to the election of convention delegates, see *The Primary Law Question*, MOHAVE COUNTY MINER, July 23, 1910, at 4.

78. *See infra* text accompanying notes 84–198.

79. To be a qualified elector, one had to be a male citizen of the United States of the age of 21 years or more, a resident of the territory for one year preceding the election, and, unless physically disabled from doing so, be "able to read the Constitution of the United States in the English Language in such a manner as to show he is neither prompted nor reciting from memory, and to write his name ... " Act of Mar. 10, 1909, ch. 13, 1909 Ariz. Sess. Laws 18.

80. There were those, however, who were incensed over the fact that Congress had obviated the English literacy requirement for the election of delegates to the constitutional convention. *See, e.g., Editorial Notes*, DOUGLAS DAILY INT'L, July 1, 1910, at 1; *Frazier Punctuates Bad Humiliating Provision of Statehood Measure*, DOUGLAS DAILY INT'L, July 1, 1910, at 3.

81. *See infra* text accompanying notes 243–46.

tional convention.[82] The euphoric reaction, at least for the moment, seemed even to transcend common political bickering as the Congressional Delegate, Ralph Cameron, and other Republican notables were welcomed everywhere as they took a victory lap around the territory.[83] There was even talk of a nonpartisan convention.[84] This movement, however, was short-lived[85] as Democrats, mainly from Maricopa County and the southern part of the territory, rose up in opposition.[86]

During the weekend of July 16, the idea of a nonpartisan, or even a bipartisan, process to select delegates was dealt a mortal blow at a Prescott meeting of the Democratic Central Committee for the territory. After a day of debate and indecision, the Maricopa County delegation, led by Sheriff Carl Hayden (later United States Senator), arrived and persuaded the others to drop the idea.[87] The Committee then agreed unanimously to recommend to the various county committees that candidates be chosen through regular party channels and not through any nonpartisan arrangement.[88] This action meant that the Democratic county conventions would nominate candidates and, in turn, was instrumental in

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82. The proclamation was issued on June 28, 1910. *Election is Called by Sloan,* ARIZONA GAZETTE, June 28, 1910, at 1. According to one source, the date for the election was to be September 15, 1910, but was changed at the last minute because approximately 450 National Guardsmen were scheduled to leave for camp on September 13. *Arrangement for Soldiers to Vote,* BISBEE EVENING MINER, July 1, 1910, at 6.

83. *See, e.g., Thursday, July 14, will be Cameron Day,* DOUGLAS DAILY DISPATCH, July 10, 1910, at 1; *Tomorrow will be Cameron Day in Douglas,* DOUGLAS DAILY DISPATCH, July 13, 1910, at 1, 8.

84. *See, e.g., The Making of a State Constitution,* THE ARIZONA REPUBLICAN, June 20, 1910, at 3; *Non Partisan Convention Urged,* ARIZONA GAZETTE, June 22, 1910, at 1; COURTLAND ARIZONAN, June 25, 1910, at 2; *Reps. Inclined to Fairness,* COCONINO SUN, July 22, 1910, at 1; *Ask for Non–Partizan* [sic]*Convention,* JEROME MINING NEWS, July 23, 1910, at 3.

85. According to one historical source, there was precedent for such action in that the delegates to the Constitutional Convention of 1891 were elected "without regard to political affiliations." 2 MCCLINTOCK, *supra* note 20, at 362. Although this may have been true for a few elections in sparsely settled counties, it was not true for most elections. *See, e.g.,* THE ARIZONA REPUBLICAN, Apr. 12, 1891, at 2 (story regarding Mohave County Democratic Central Committee calling for Democratic County Convention to elect nominees for delegate); *id.,* Apr. 26, 1891, at 4 (story regarding Maricopa County Democratic Convention electing nominees for delegate); *id.,* Apr. 28, 1891, at 2 (story regarding Maricopa County Republican Central Committee nominating candidates for delegate); *id.,* May 1, 1891, at 1 (story regarding Pima County Republican Convention nominating candidates for delegate); *id.,* May 5, 1891, at 1 (article ridiculing Pima County Democratic nominees for delegate); *id.,* May 7, 1891, at 4 (story regarding Yavapai County Republican nominees for delegate); *id.,* May 8, 1891, at 2 (editorial rejecting idea of a nonpartisan convention); *The Members Elect,* THE ARIZONA DAILY GAZETTE, May 20, 1891, at 2 (reporting election results based on party affiliation); *see also Report of Acting Governor of Arizona to the Secretary of the Interior* 40 (1891) (describing the election of delegates to the Constitutional Convention of 1891 as highly partisan).

86. *See Statehood,* GRAHAM GUARDIAN, June 24, 1910, at 2; *Arizona's Constitution,* GRAHAM GUARDIAN, July 8, 1910, at 2; *Maricopa Looks out for Main Chance,* DOUGLAS DAILY INT'L, June 25, 1910, at 1; *The Constitutional Convention,* DOUGLAS DAILY INT'L July 6, 1910, at 4; *Democrats are for Party Lines,* ARIZONA DEMOCRAT, July 9, 1910, at 1.

87. *See* ARIZONA DEMOCRAT, July 19, 1910, at 3; *Spurns Plan of Non-Partisan Convention—Democratic Committee in Favor of Waging the Fight for Delegates on Party Lines,* ARIZONA JOURNAL–MINER, July 17, 1910, at 1; *Bi-Partisan Plan of Selecting Constitutional Delegates Knocked out by Democrats, Full Democratic Ticket to be Nominated in Each County—Party Goes Squarely on Record,* GRAHAM GUARDIAN, July 22, 1910, at 1.

88. *See Partisan Elections Choice of Democratic Committee,* ARIZONA GAZETTE, July 18, 1910, at 2.

having candidates that were pledged to include specific proposals in the constitution if elected. From this point on it was clear that the Democrats intended to make good use of the fact that they outnumbered the Republicans in the territory. Their plan was to control the convention.[89]

The idea of a nonpartisan convention was not embraced unanimously by the Republicans either,[90] with some even viewing it as an insidious idea,[91] but once the Democrats decided to field candidates along party lines, the Republicans were left with little choice but to follow suit. Nonetheless, the Republican Central Committee, also meeting in Prescott about a week after the Democrats, took a different tack.[92] Although the Republicans could not avoid nominating candidates, the Central Committee preferred to leave the details of the nominating process to the county conventions.[93] If the Republicans in a particular county wanted to pursue a nonpartisan or bi-partisan approach, they were free to do so.[94] This type of *laissez-faire* attitude no doubt contributed to the fact that the Republicans would eventually adopt very general party platforms for their candidates, in the main arguing for a "safe and sane" constitution,[95] one that was sure to be approved by the Congress and the President.[96] Thus, from the outset the Republican strategy was to play up the idea that the election of Democrats as delegates to the constitutional convention would jeopardize the attainment of statehood.[97] The Democrats, according to the Republicans, could not be trusted to draft a document that would be acceptable to the Republicans in Washington.[98] In any event, the battle lines between the two parties had begun to form by the end of July.

In the meantime, a convention of labor union leaders was held in Phoenix to discuss measures to be submitted for inclusion in the constitution.[99] To the surprise of some in attendance, a move was made to organize the group—which had representatives from eight counties—into a new political party, to be called the Labor Party.[100] After a heated battle and a walkout by the head of the Tucson Typographical Union—reputed to be one of the most powerful and effective

89. *Id.*
90. *See Partisan Delegates to Convention,* TUCSON CITIZEN, June 20, 1910, at 2.
91. *See Select Best Men for the Convention,* TUCSON CITIZEN, June 25, 1910, at 2.
92. For some reason, Graham, Pima, and Pinal counties were not represented at the meeting. No formal action was taken at this meeting, possibly because not all counties were represented. *See As Chairman of Republican Territorial Committee Albert Sames Succeeds,* THE ARIZONA REPUBLICAN, July 26, 1910, at 1.
93. *See id.*
94. *See id.*
95. The slogan "safe and sane" constitution stemmed from a conversation between Congressional Delegate Ralph Cameron and President Taft. Before returning to Arizona after the statehood bill had become law, Cameron asked Taft if he had any message for Arizonans and Taft reportedly said "tell them if they send me a safe and sane constitution for my signature, that I will be repaid for my efforts [in supporting statehood for Arizona]." *Keynote Sounded of Republican Campaign,* ARIZONA JOURNAL-MINER, July 26, 1910, at 5; *Safe and Sane Only Demand Says Cameron,* BISBEE DAILY REVIEW, July 15, 1910, at 1.
96. The Organic Act required that Congress not only approve the constitution proposed for statehood, but that the President also had to approve it. Act of June 20, 1910, ch. 310, § 22, 36 Stat. 557 (1910). Although President Taft had publicly expressed support for Arizona statehood, he had warned against any such constitution as that of recently admitted Oklahoma, which he described as a "zoological garden of cranks." 2 MCCLINTOCK, *supra* note 20, at 365.
97. *See infra* note 210 and accompanying text.
98. *Id.*
99. *Convention is for Woman Suffrage,* ARIZONA GAZETTE, July 12, 1910, at 1.
100. *Labor Party will Take an Active Interest,* ARIZONA GAZETTE, July 13, 1910, at 2.

unions in the territory[101]—the organizers succeeded in passing a resolution that created "'a workers' political party for the purpose of nominating and electing delegates to the constitutional convention.'"[102] The Labor Party, along with the Socialist Party which was already active in some parts of the territory, rounded out the political parties that were to battle for convention delegates.[103]

C. Nominating the Candidates and Defining the Issues

1. Parties and Politics

The selection process for delegates to the constitutional convention began in earnest in August with the call for county conventions to nominate candidates and develop platforms. There were at least two active political parties—Democrat and Republican—in every county, but there was a lingering antipathy in a couple of counties toward a partisan selection process. The Democrats of Coconino County seriously debated whether to nominate a nonpartisan ticket; and after rejecting a proposed nonpartisan slate, they proceeded to nominate one of the nonpartisan candidates as part of a Democratic slate.[104] In Mohave County, the Republicans adopted the platform of the Yavapai County Republicans, but refused to nominate any candidate for delegate to the convention.[105] All the other counties nominated full slates of Democratic and Republican candidates although there were still those in the Phoenix[106] and Prescott[107] areas that were seriously interested in a nonpartisan approach to developing a new constitution.

In addition to the two major parties, the Labor Party and the Socialists fielded separate slates of candidates in Cochise,[108] Maricopa,[109] Mohave,[110] and Pima[111] counties. The Labor Party also nominated its own ticket in Graham County.[112] A fifth party, the Prohibitionists, chose not to nominate any of its own candidates; instead, party members agreed to support "those candidates of other

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101. *Convention of Labor Adjourns*, ARIZONA GAZETTE, July 14, 1910, at 8.

102. *Labor Party will Take an Active Interest, supra* note 100.

103. Although the Prohibition Party was also active in Arizona, it chose not to nominate candidates. Instead, it issued a statement urging all Prohibitionists "to vote for candidates of other parties whose avowed course in the convention, if elected, would most nearly represent the principles of the prohibitionist party." *Make Appeal for Rights of People*, ARIZONA GAZETTE, Sept. 10, 1910, at 12.

104. *Democrats go Partisan*, COCONINO SUN, Aug. 5, 1910, at 1; *Democrats Nominate two Candidates*, COCONINO SUN, Aug. 12, 1910, at 1.

105. *Republican Party Convention*, MOHAVE COUNTY MINER, Aug. 20, 1910, at 2.

106. *See, e.g., Rousing Meeting for Progressive Government*, ARIZONA GAZETTE, Aug. 25, 1910, at 1.

107. *See, e.g., Action of Democratic Central Committee Repudiated*, ARIZONA JOURNAL-MINER, July 21, 1910, at 1.

108. *See Labor Party Names its Ticket*, BISBEE EVENING MINER, Aug. 23, 1910, at 1; *Socialists in Field with Ticket*, BISBEE EVENING MINER, Aug. 25, 1910, at 1.

109. Although the newspapers of Maricopa County gave very little publicity to the Labor and Socialist parties, it is clear from the election returns that each party fielded a state of candidates. *See Official Count of Recent Election*, ARIZONA GAZETTE, Sept. 26, 1910, at 1.

110. *See Labor Party Convention*, MOHAVE COUNTY MINER, Aug. 20, 1910, at 2; *Socialist Party Nominates*, MOHAVE COUNTY MINER, AUG. 20, 1910, at 2.

111. *See Pima County Socialists and Labor Party put Tickets in Field*, THE TUCSON CITIZEN, Aug. 20, 1910, at 1.

112. *Labor Party Meets*, GRAHAM GUARDIAN, Aug. 26, 1910, at 1.

parties whose avowed course in the convention, if elected, would most nearly represent the principles of the prohibition party."[113]

Having been required to use the county convention system[114] and having rejected a nonpartisan process for nominating candidates,[115] it was incumbent upon the various parties to make known what their candidates would advocate if elected. The territorial central committees for each party had met to decide on an overall approach to the election, but authority to adopt an independent platform apparently remained with each county organization.[116] In general, the Republicans took the position that the constitution should be a very basic document essentially giving the legislature the broadest authority to enact the detailed provisions necessary for governing the new state.[117] They espoused a "safe and sane" constitution, eschewing any "radical" notions that might cause the denial of statehood, as had happened in 1891.[118] Many Republicans subscribed to the notion that it was best to send sensible but uninstructed delegates to the convention so that the delegates would be free to come to a consensus as to what ought to be contained in a sound governing document.[119] Not all Republican county conventions, however, followed this pattern; some felt that there was a need to be more specific.

In contrast, there was strong feeling among most Democrats that candidates should pledge, if elected, to support platforms adopted by the county conventions and that the platforms should contain a number of specific provisions to be included in the new constitution.[120] The Labor and Socialist Parties took the same approach as the Democrats as they too advocated specific provisions in their platforms.[121] In contrast, however, the Labor and Socialist Parties tended to adopt the same platform for their respective parties in those counties where they nominated candidates whereas the Democrats showed considerable independence as hardly any two Democratic platforms were alike. Consequently, the overall process produced a wide range of proposals for the electorate to consider.

This diversity has proved to be an important factor in the interpretation of what happened at the constitutional convention. Because the parties in each county developed different platforms, and because there were significant differences within the two major parties, analysis of these platforms sheds light

113. *Make Appeal for Rights of People,* ARIZONA GAZETTE, Sept. 10, 1910, at 12.
114. *See supra* text accompanying notes 73–77.
115. *See supra* text accompanying notes 84–89.
116. *See supra* notes 87–94 and accompanying text.
117. *See, e.g., The Two Policies,* THE ARIZONA REPUBLICAN, July 29, 1910, at 2; *Maricopa Makes Contribution to Constitutional Convention,* THE ARIZONA REPUBLICAN, Aug. 4, 1910, at 1; *Republican Position on Constitution,* DOUGLAS DAILY DISPATCH, July 31, 1910, at 2.
118. *See, e.g., Democratic Made Constitution Cost Arizona Statehood,* DOUGLAS DAILY DISPATCH, Aug. 16, 1910, at 6.
119. *See, e.g., Republican Candidates to the Constitutional Convention,* BISBEE EVENING MINER, Aug. 24, 1910, at 2; *Republicans Declare Against Instructions,* THE DAILY SILVER BELT, Aug. 14, 1910, at 1; *Republicans do not Favor Instructed Delegates,* THE TUCSON CITIZEN, Aug. 15, 1910, at 8.
120. *The Democracy Must be Bold,* ARIZONA DAILY STAR, Aug. 10, 1910, at 4; *Democrats Today in Convention,* ARIZONA DAILY STAR, Aug. 11, 1910, at 8; *Democrats put Forth Dogmas,* DOUGLAS DAILY INT'L, July 22, 1910, at 4; *Adopt a Platform,* GRAHAM GUARDIAN, July 8, 1910, at 1.
121. *See infra* text accompanying notes 177–78, 195–96.

on how and why certain provisions ended up in the constitution, particularly since there was ample opportunity for the participants at the county convention level to know what was happening throughout the territory.[122] The variety of platform proposals shows that serious thought went into deciding what the platforms should—or for that matter, should not—contain. There was very little in the way of one county convention rubber stamping what had taken place in another county convention. Because of this grass roots process, the platforms in many ways serve as barometers for what the citizens of the territory felt was important in their lives. Therefore, a closer look at the particulars of the platforms is warranted.

2. Democratic Platforms

The Democratic platforms are the most helpful in assessing what was important to the electors. This is true, not only because more Democrats than Republicans were elected as convention delegates,[123] but it is true because, as discussed above, it was mainly the Democrats who seized the initiative in defining the issues.[124] Because the Republicans, for the most part, decided to send uninstructed delegates to the convention,[125] it would have been a contradiction to adopt platforms containing a laundry list of proposals that Republican candidates would be pledged to include in the constitution if elected. Even when the Republicans did make specific proposals in their platforms, more often than not they conditioned their inclusion in the constitution upon a separate vote by the people or merely advocated that the legislature be empowered to adopt the proposals.[126]

The Arizona Republican, a Phoenix newspaper, captured the tone of the ensuing political fray when it announced on the front page of its August 10 issue that the Maricopa County Democrats had that day "fired the first broadside in [the] constitution fight."[127] The accompanying news story reviewed the events surrounding the first Democratic county convention to adopt a platform.[128] This platform advocated constitutional provisions that would establish the initiative and referendum; regulate public utilities and transportation companies; require nonpartisan election of judges and superintendents of public instruction; limit the term of office of state and county officials to four years; prohibit certain exclusive business franchises; and prohibit tax exemptions and the issuance of government bonds to promote private enterprise.[129] The platform also proposed

122. There were well over 40 daily and weekly newspapers being published in the territory in 1910, most of which gave good coverage to the political events of the day. Copies of many of these newspapers still exist in original form or on microfilm. *See supra* note 62 and accompanying text.

123. *See infra* text accompanying notes 241–46.

124. *See supra* text accompanying notes 88–89.

125. *See supra* text accompanying note 119.

126. *See infra* text accompanying notes 156–71.

127. THE ARIZONA REPUBLICAN, Aug. 10, 1910, at 1.

128. *Id.* The first Democratic county convention was convened by Coconino County Democrats on August 6, 1910, four days before the Maricopa County Democratic Convention. Although they nominated two candidates for delegate to the constitutional convention, there was no mention in the only newspaper articles to report on the convention of their having adopted any platform. *See Democrats go Partisan, supra* note 104; *Democrats Nominate two Candidates, supra* note 104. The author was unable to find any evidence that a Democratic platform was ever adopted in Coconino County.

129. ARIZONA DEMOCRAT, Aug. 10, 1910, at 1.

constitutional provisions that would require the legislature to enact laws providing for the direct election of United States Senators, eliminating corrupt campaign practices, and establishing the right to recall public officials.[130] In addition, there were planks mandating a direct vote by the electorate on the questions whether prohibition and women's suffrage should be made a part of the constitution.[131] The latter propositions would be voted on at the same time the electorate voted to approve or disapprove the proposed constitution.[132] All in all, the Maricopa platform was reasonably detailed in evidencing the concerns of the county Democrats. Moreover, the platform provided a template with which to compare the concerns in other county conventions, Democratic and otherwise, in the territory, as reflected in their platforms.

The entire process of nominating candidates for delegate to the constitutional convention and drafting platforms was concluded in all thirteen counties of the territory by August 20.[133] As far as the Democrats were concerned, newspaper accounts of the county conventions reveal that at least ten platforms,[134] including that of Maricopa, advocated adoption of the initiative and referendum, with nine supporting a recall provision,[135] while seven platforms advocated selection of United States Senators by direct election even though this was controlled by the United States Constitution at that time.[136] Although the

130. *Id.*
131. *Id.*
132. *Id.*
133. In addition to Coconino County, the author was unable to find a copy of the Democratic platforms for Apache and Santa Cruz counties, *see supra* note 128, although it was reported that such platforms had been adopted. *Proceedings of County Democrat Convention,* ST. JOHNS HERALD, Aug. 25, 1910, at 2; *Democratic Convention,* THE OASIS, Aug. 20, 1910, at 9 (reporting only that Santa Cruz Democratic platform declares for initiative, referendum and recall).

Perhaps the failure of the newspapers in Apache County to report on the platforms is explained by the following piece from the *St. Johns Herald*:

> Next Monday is the day of election for delegate to the constitutional convention. The two political parties are lined up for the battle in this county, but it is thought that a very light vote will be polled. Statehood is not so tangible a subject as a man running for a county office, and the interest in this election is not all it should be for such an important matter.

ST. JOHNS HERALD, Sept. 8, 1910, at 3.

134. Mohave County Democrats adopted a general platform with no specific proposals. *See Democratic County Convention, supra* note 105. The author was unable to locate information regarding any Democratic platforms for Coconino and Apache counties. *See supra* notes 128, 133.

135. The following Democratic county platforms supported the initiative, referendum and recall: Cochise, *Democratic Candidates and Platform,* DOUGLAS DAILY INT'L, Aug. 22, 1910, at 1; Gila, *Gila County Democrats Harmonious,* ARIZONA DAILY STAR, Aug. 25, 1910, at 5; Graham, *Democrats Declare for People's Constitution,* GRAHAM GUARDIAN, Aug. 26, 1910, at 1; Maricopa, *Maricopa Democrats' Convention Today,* ARIZONA GAZETTE, Aug. 10, 1910, at 1; Pima, *Democratic Platform is Progressive and Popular,* ARIZONA DAILY STAR, Aug. 18, 1910, at 1; Pinal, *Democratic Convention,* ARIZONA BLADE-TRIBUNE, Aug. 27, 1910, at 1; Santa Cruz, *Democratic Convention,* THE OASIS, Aug. 20, 1910, at 9; Yavapai, *Radicals Control Democratic Convention,* ARIZONA JOURNAL-MINER, Aug. 17, 1910, at 1; Yuma, *Democrats Convention Names Constitutional Convention Candidates,* YUMA EXAMINER, Aug. 17, 1910, at 1. The Navajo County Platform supported the initiative and referendum, but not the recall, *Democratic Convention Held Last Saturday,* THE HOLBROOK ARGUS, Aug. 23, 1910, at 1.

136. These were the Democratic platforms of Cochise County, *Democratic Candidates and Platform, supra* note 135; Maricopa County, *Maricopa Democrats' Convention Today, supra* note 135; Navajo County, *Democratic Convention Held Last Saturday, supra* note 135; Pima County, *Democratic Platform is Progressive and Popular, supra* note 135; Pinal County,

Maricopa County platform failed to mention it, seven other Democratic county conventions called for nomination of candidates for public office by means of primary elections.[137] These proposals, however, were the only proposals for inclusion in the constitution that were endorsed by a majority of the Democratic county conventions. Agreement on the other issues was fragmented.

Four other Democratic county organizations agreed with the Maricopa County Democrats that there was a serious need for a corrupt practices act to eliminate abuses in election campaigns.[138] However, only two counties joined Maricopa in proposing that exclusive business franchises[139] and special tax exemptions[140] be curtailed. On the other hand, five county conventions endorsed the concept of an employer's liability act patterned after the federal legislation covering interstate railroad workers;[141] and four wanted to make sure there was a liberal provision for amending the constitution.[142] Neither of the preceding proposals were included in the Maricopa county platform. Three county organizations wanted to limit the power of the courts to issue injunctions,[143] but, again, this did not appear to be a concern of the Maricopa County Democrats since there was no mention of it in their platform.

No other proposition received the support of more than two Democratic county organizations. Included among those receiving support from at least two counties were proposals for regulating public utilities and railroads,[144] private

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Democratic Convention, supra note 135; Yavapai County, *Radicals Control Democratic Convention, supra* note 135; and Yuma County, *Democrats Convention Names Constitutional Convention Candidates, supra* note 135.

137. The Twenty-fifth Territorial Legislature had already enacted a direct primary system in 1909, *see supra* text accompanying note 75. Apparently, the proponents of this measure wanted to make it clear that they wanted the same system to continue under the new constitution. The following Democratic county platforms advocated direct primaries: Cochise, *Democratic Candidates and Platform, supra* note 135; Gila, *Gila County Democrats Harmonious, supra* note 135; Navajo, *Democratic Convention Held Last Saturday, supra* note 135, Pima, *Democratic Platform is Progressive and Popular, supra* note 135; Pinal, *Democratic Convention, supra* note 135; Yavapai, *Radicals Control Democratic Convention, supra* note 135; and Yuma, *Democrats Convention Names Constitutional Convention Candidates, supra* note 135.

138. Cochise, *Democratic Candidates and Platform, supra* note 135; Navajo, *Democratic Convention Held Last Saturday, supra* note 135; Pima, *Democratic Platform is Progressive and Popular, supra* note 135; Yuma, *Democrats Convention Names Constitutional Convention Candidates, supra* note 135.

139. Cochise, *Democratic Candidates and Platform, supra* note 135; Navajo, *Democratic Convention Held Last Saturday, supra* note 135.

140. Navajo, *Democratic Convention Held Last Saturday, supra* note 135; Yavapai, *Radicals Control Democratic Convention, supra* note 135.

141. Cochise, *Democratic Candidates and Platform, supra* note 135; Navajo, *Democratic Convention Held Last Saturday, supra* note 135; Pima, *Democratic Platform is Progressive and Popular, supra* note 135; Pinal, *Democratic Convention, supra* note 135; Yavapai, *Radicals Control Democratic Convention, supra* note 135.

142. Graham, *Democrats Declare for People's Constitution, supra* note 135; Pima, *Democratic Platform is Progressive and Popular, supra* note 135; Pinal, *Democratic Convention, supra* note 135; Yuma, *Democrats Convention Names Constitutional Convention Candidates, supra* note 135.

143. Navajo, *Democratic Convention Held Last Saturday, supra* note 135; Pinal, *Democratic Convention, supra* note 135; Yavapai, *Radicals Control Democratic Convention, supra* note 135.

144. Maricopa, *Maricopa Democrats' Convention Today, supra* note 135; Navajo, *Democratic Convention Held Last Saturday, supra* note 135.

corporations,[145] and the issuance of government bonds.[146] In addition women's suffrage[147] and an eight hour workday[148] managed to make it into only two platforms. The Democrats of only one county approved such items as limitations on tax rates,[149] abolition of the fee system in the courts,[150] compulsory arbitration of labor matters,[151] and, of particular relevance to this Article, prohibition of limits on damages in personal injury cases.[152] In addition, Democrats of Maricopa County stood alone on proposing nonpartisan elections for judges and term limits of four years or less for public officials.[153] Of course, the limited support of these items at the county convention level did not mean that the Democratic delegates from other counties would not support a number of them at the constitutional convention itself,[154] but there may be significance in the fact that there was not more support for these propositions at the grass roots level. For example, what is the significance of the fact that so few proposals dealing with tort liability for personal injury were adopted in the Democratic platforms? First, however, one needs to examine what the other political parties proposed.

3. Republican Platforms

The Republican platforms were also an interesting lot.[155] Out of thirteen county conventions six adopted very general statements without advocating any specific proposals,[156] while a seventh convention put forth only a single specific proposition in addition to a general declaration.[157] Of the six Republican county conventions that did adopt specific planks, only one proposed that the initiative and referendum be provided for in the constitution without submitting it to the

145. Maricopa, *Maricopa Democrats' Convention Today, supra* note 135; Navajo, *Democratic Convention Held Last Saturday, supra* note 135.

146. Maricopa, *Maricopa Democrats' Convention Today, supra* note 135; Yavapai, *Radicals Control Democratic Convention, supra* note 135.

147. Maricopa, *Maricopa Democrats' Convention Today, supra* note 135; Navajo, *Democratic Convention Held Last Saturday, supra* note 135.

148. Pinal, *Democratic Convention, supra* note 135; Yavapai, *Radicals Control Democratic Convention, supra* note 135.

149. Pima, *Democratic Platform is Progressive and Popular, supra* note 135.

150. Pima, *Democratic Platform is Progressive and Popular, supra* note 135.

151. Navajo, *Democratic Convention Held Last Saturday, supra* note 135.

152. Navajo, *Democratic Convention Held Last Saturday, supra* note 135.

153. *See* ARIZONA DEMOCRAT, Aug. 10, 1910, at 1, *supra* note 129.

154. For example, even though women's suffrage was not adopted in the constitution, the delegates did vote to include an eight hour workday provision. *See infra* notes 588, 605 and accompanying text.

155. The author was able to find a Republican platform for all county conventions save that for Apache County. Even though a county convention was held and a candidate was nominated, *see County Convention Call,* ST. JOHN'S HERALD, Aug. 11, 1910, at 3; *Official Minutes Board of Supervisors,* ST. JOHN'S HERALD, Sept. 29, 1910, at 1, there was no report in the newspaper concerning the Republican platform for Apache County.

156. Coconino, *Republican Candidates are the Sure Winners,* COCONINO SUN, Aug. 19, 1910, at 1; Mohave, *Republican Party Convention,* MOHAVE COUNTY MINER, Aug, 20, 1910, at 2; Navajo, *Proceedings of the Republican Convention,* THE HOLBROOK ARGUS, Aug. 23, 1910, at 1; Pima, *Republican Platform,* THE TUCSON CITIZEN, Aug. 15, 1910, at 4; Yavapai, *Republican Platform of Yavapai County,* ARIZONA JOURNAL-MINER, Aug. 14, 1910, at 1; Yuma, *Republican Convention Names Constitutional Convention Candidate,* YUMA EXAMINER, Aug. 17, 1910, at 1.

157. Gila. *See Cila [sic] County Republican Platform,* THE DAILY SILVER BELT, Aug. 28, 1910, at 2.

electorate for a separate vote.[158] Two other platforms proposed that the electorate should decide the issue.[159] The most popular plank, which even then was adopted in only five Republican platforms, called for a primary system to nominate candidates for public office,[160] a system the territorial legislature had already adopted.[161] Five conventions proposed that United States Senators be elected directly by the voters[162] and four conventions proposed that there be a tax exemption for household goods, tools, and implements of trade possessed by a head of a family if the value did not exceed $500.[163] There was little Republican support for any other specific proposals except for that emanating from three counties—Graham,[164] Maricopa,[165] and Pinal.[166] Republican platforms from each of these counties contained provisions, a number of which were identical, addressing women's suffrage, prohibition, limits on property tax exemptions, the need for a nonpartisan highway commission to administer highway construction and improvements, the need to prohibit trusts and other conspiracies in restraint of trade, nonpartisan election of judges, limits on exclusive franchises, and management and disposition of public lands including provisions for reimbursing occupants and lessees for improvements thereon whenever the lands are sold.

Not all of the proposals mentioned in the preceding paragraph, however, enjoyed an outright commitment to include them in the new constitution. For example, the Republicans of Graham County advocated that the issues of women's suffrage and prohibition be decided by the voters at the time the constitution was voted on,[167] while Maricopa and Pima County Republicans merely proposed that the constitution empower the legislature "to extend the elective franchise to women" and "to license, regulate, control, restrain or prohibit, through statewide prohibition or local option, the manufacture and sale of intoxicating liquors."[168]

There were other proposals by Republicans, but most of them came from Santa Cruz County, evidencing a considerable spirit of independence. In addition to advocating the adoption of the initiative and referendum,[169] the Santa Cruz

158. Santa Cruz, *Bracey Curtis Nominated by the Convention of Santa Cruz Republicans for Delegate to the Constitutional Convention*, THE OASIS, Aug. 20, 1910, at 1 [hereinafter *Bracey Curtis Nominated*].

159. Cochise, *Republicans Pick out Winners*, BISBEE EVENING MINER, Aug. 22, 1910, at 1, and Gila, *See Cila [sic] County Republic on Platform, supra* note 157.

160. Cochise, *see Republicans Pick out Winners*, BISBEE EVENING MINER, SUPRA note 159; Graham, *see Republicans Adopt a Weak Platform*, GRAHAM GUARDIAN, Aug. 26, 1910, at 1; Maricopa, *see Convention Completes Work*, ARIZONA GAZETTE, Aug. 15, 1910, at 1; Pinal, *see Republican Platform*, ARIZONA BLADE-TRIBUNE, Sept. 3, 1910, at 1; Santa Cruz, *see Bracey Curtis Nominated, supra* note 158.

161. *See supra* text accompanying note 75.

162. Cochise, *see Republicans Pick out Winners, supra* note 159; Graham, *see Republicans Adopt a Weak Platform, supra* note 160; Maricopa, *see Convention Completes Work, supra* note 160; Pinal, *see Republican Platform, supra* note 160; Santa Cruz, *see Bracey Curtis Nominated, supra* note 158.

163. Cochise, *Republicans Pick out Winners, supra* note 159; Graham, *Republicans Adopt a Weak Platform, supra* note 160; Maricopa, *Convention Completes Work, supra* note 160; Pinal, *Republican Platform, supra* note 160.

164. *See Republicans Adopt a Weak Platform, supra* note 160.

165. *See Convention Completes Work, supra* note 160.

166. *See Republican Platform, supra* note 160.

167. *See* sources cited *supra* note 160.

168. *Convention Completes Work, supra* note 160, at 2; *Republican Platform, supra* note 156.

169. *See* sources cited *supra* note 160.

platform also called for constitutional provisions authorizing the recall of public officials, establishing a voter registration system and corrupt campaign practices law, establishing a commission to regulate public service corporations, and prohibiting any "educational qualification" for voters.[170] The only other proposal offered by Republicans worth mentioning came from Navajo County, that being a none-too-specific recommendation that "all vital and important questions should be submitted to a vote of the people."[171]

There was no mention in any of the Republican platforms of the subject of tort liability or damages for bodily injury or death. Nevertheless, the subject would come up in a peculiar sort of way in the ensuing campaigns.

4. Labor Platforms

A Phoenix meeting of representatives from the various unions in Arizona was called in mid-July of 1910. The ostensible purpose of the gathering was discussion of measures that labor wanted incorporated in the constitution.[172] This meeting was scheduled several weeks before any of the Democratic conventions convened. Representatives from eight counties were present. The first day was spent discussing and voting on various propositions. On the second day a resolution was introduced calling for labor to support those candidates from other parties who agreed to embrace the labor propositions approved at the Phoenix meeting and advocate that these propositions be included in the constitution.[173] This resolution was brought up several times and discussed, sometimes acrimoniously, but eventually it was defeated.[174] Thereafter, a resolution to organize a workers' political party for the purpose of nominating and electing delegates to the constitutional convention was offered. It passed without opposition,[175] perhaps due to the previous departure of a number of proponents of the prior resolution.[176]

Labor, having established its own political party, proceeded to adopt a platform that supported universal suffrage; the initiative, referendum and recall; election of United States Senators by popular vote; two year terms for state officials; the right of the state to engage in industrial pursuits; an anti-injunction law; an employers' liability act; government by enacted law; abolishment of the fee system in all courts; the right of the state to seize property of those who refuse to comply with the law; and the right of defendants in criminal cases to have the state defray their expenses as well as those of the prosecution.[177] In addition, the Labor Party platform advocated that the power to declare laws unconstitutional be vested in the electors through a referendum; that there be a six months residency requirement for voters; that no private police be permitted to operate or give testimony; that no law be passed to limit the franchise, including the requirement of any fee to register or vote; and that the constitution

170. *Id.*
171. *Proceedings of the Republican Convention, supra* note 156. The platform of the Navajo County Republicans was listed as one of the six that adopted only general statements. *Id.*; *see also* VAN PETTEN, *supra* note 20, at 19–20.
172. *See Convention is for Woman Suffrage, supra* note 99.
173. *Labor Party will Take an Active Interest, supra* note 100.
174. *Id.*
175. *Id.*
176. *See Convention of Labor Adjourns, supra* note 101.
177. For the Labor Party platform that was approved at the July, 1910 Phoenix meeting, see *Labor Party will Take an Active Interest, supra* note 100.

be subject to amendment only by majority vote of the electorate on an initiative of the legislature or the people.[178]

Having approved a platform at the Phoenix gathering of labor delegates, the Labor Party then went on to organize separate slates of candidates in at least five counties.[179] Much has been made of the role that labor played in electing delegates to the constitutional convention and the influence it had on drafting the document.[180] Although there is no doubt that labor was an important force in Arizona in 1910 and that it did affect events preceding and occurring during the convention, it is less clear that its direct impact on events was nearly as great as that of the Progressive Movement in general.[181] Political ideals of the Progressives, which were gaining in popularity throughout the country at the time,[182] had also permeated the Democratic Party in Arizona.[183]

Reformers across the country supported a number of measures giving the electorate more control over government.[184] Chief among these measures were the adoption of primary systems allowing popular choice of party candidates and direct election of senatorial candidates.[185] The initiative, referendum, and recall were also advocated as further extending democratic control by the people.[186] Women's suffrage had become a national issue.[187] Regulation of big business—

178. *Id.*

179. The five counties consisted of Cochise, Graham, Maricopa, Mohave, and Pima Counties. *See supra* notes 108–12. It was probably no coincidence that four of these were the counties with the largest populations in 1910. *See* WALKER & BUFKIN, *supra* note 27, at table 61.

180. *See, e.g.*, WAGONER, *supra* note 20, at 464; WYLLYS, *supra* note 20, at 308–09; T.A. Mcginnis, The Influence Of Organized Labor On The Making Of The Arizona Constitution (1930) (unpublished M. thesis, University of Arizona) (on file at either the University of Arizona Library or the Department of Library, Archives, and Public Records at the State Capitol).

181. The Progressive Movement was spawned by the intellectual and political ferment of the 1880's and 1890's and is generally described as taking place in the first two decades of the twentieth century. *See* ARTHUR S. LINK, AMERICAN EPOCH: A HISTORY OF THE UNITED STATES SINCE THE 1890'S 68–91 (3d ed. 1967); HENRY B. PARKES, THE UNITED STATES OF AMERICA: A HISTORY 543–64 (2d ed. 1959); ROBERT H. WIEBE, THE SEARCH FOR ORDER 1877–1920, at 164–95 (1967); *see generally* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BYRAN TO F.D.R. (1955).

182. *See* sources cited *supra* note 181.

183. This is not to say that the ideals of the Progressive Movement were embraced only by Democrats. As one historian noted:

> Like most earlier reformers in the British and American political tradition, the progressives had a pragmatic approach. Whenever they saw an evil, they attempted to deal with it, without adopting any comprehensive theory or formulating ultimate objectives. This method of piece-meal reform made for a maximum of agreement and prevented conflicts from becoming fanatical or irreconcilable. During the progressive period there was no clear-cut line of division between reformers and conservatives. Popular sentiment so strongly favored reform that most responsible political leaders recognized that it was necessary, although some of them wished to move much further than others. Party labels therefore became even more meaningless than usual. There were progressive Republicans and progressive Democrats, with no perceptible difference in their objectives. And although progressivism was probably strongest in the Middle Western farm belt, where it built on foundations laid by the Populist movement, it spread to all sections of the country.

PARKES, *supra* note 181, at 544.

184. *See* PARKES, *supra* note 181, at 544.

185. *See id.*

186. *See id.*

187. *See id.*

particularly the monopolistic practices of the railroads and public utilities—and the elimination of corruption in election campaigns and government were high on the agenda of the reformers.[188] Welfare legislation to protect wage-earners in the form of wage and hour, child labor, and workers' compensation laws were enacted across the country.[189]

Arizona was a true microcosm as the platforms of the various Democratic county conventions in 1910 clearly reflected not only the general ideals of the Progressive Movement, but also embraced the specifics.[190] Thus, even though the Labor Party platform was approved at the Phoenix meeting almost a month before any Democratic county convention was held, it appears not to have had much influence on what the Democrats did. Although there was agreement between the Democrats and the Labor Party on certain fundamental issues such as the initiative, referendum, and recall, and some election proposals, there was not much congruence on other matters.[191] Moreover, many of the propositions in which labor would be interested were probably included in the county platforms of the Democrats because they reflected Progressive ideals that were being embraced nationally and not just because the Arizona labor movement might have suggested them. Even then, however, one should not assume that the interests of labor were always well represented by the Democrats. There is significant evidence that the Democrats and labor were not completely in lock step either on the nomination of delegates or on what the issues should be.[192] However, if there were differences between Labor and the Democrats, the gap between the Socialists and the Democrats was even greater.

5. Socialist Platform

Some of the people who attended the Phoenix gathering of labor union representatives were socialists and apparently many of them cast their lot with the new Labor Party.[193] This fusion, however, was not to prove uniform throughout the territory. As indicated earlier, separate slates of candidates were eventually nominated by the Socialist Party in several counties.[194] If the Pima

188. *See id.*
189. *See id.*
190. *See supra* text accompanying notes 128–53.
191. Only the Pima County Labor Party platform was reported in the newspaper. It included most of the planks that were approved at the Phoenix meeting, plus a few new proposals such as a female and child labor law, secret ballot, state guarantee banking law, no competitive convict labor, and compulsory education to age 16. The only provision concerning tort liability was one advocating the adoption of an employers' liability act. Except for the initiative and referendum, women's suffrage, and the right of the state to engage in industrial pursuits, it proposed that the legislature enact the laws mentioned above rather than inserting them in the Constitution. *Labor Party Puts its own Ticket in Field,* THE TUCSON CITIZEN, Aug. 20, 1910, at 2.

The Labor Party in Cochise County did not hold a convention, but nominated their candidates by petition. *Labor Party Names its Ticket,* BISBEE EVENING MINER, Aug. 23, 1910, at 1. There was no report of a labor platform in Cochise County newspapers, nor were there reports in the newspapers of the time of a Labor Party platform in Graham, Maricopa, or Mohave counties.

192. This diversion of interests was also reflected at the national level. Although the Progressive Movement drew support from organized labor, it had no solid basis of popular support among the masses of workers, nor was it particularly sympathetic to labor's needs. The movement was essentially a revolt of the middle classes. *See* LINK, *supra* note 181, at 69; *see also* HOFSTADTER, *supra* note 181, at 239.
193. *See Labor Party will Take an Active Interest, supra* note 100.
194. *See supra* text accompanying notes 108–11.

County Socialist platform was any indication of their political views, the Socialists were radical indeed.

The Pima County Socialist platform[195] opened with a preface stating that the constitution of Arizona should under no circumstances be modeled after the constitution of the United States or of any state now in existence for the reason that new economic conditions had arisen that required a new constitutional response. The preface went on to assert that the capitalistic class now owned all railroads and telegraph lines, and owned or controlled all land and products of land while the great mass of the population was left destitute and dependent on the will and, therefore, pleasure of the capitalists. The platform demanded that all political power should at all times be vested in the people, and exercised only for their protection, security and welfare, and that a majority of the people should have the power to freely amend, alter, or abrogate all laws. Although the constitution was to be a mandate to the legislature and a guide to the people, no judge or other official was to have the power to set aside any law on the basis of its violation of the constitution or public policy or on any other ground.

The Socialist platform went on to assert that civil government should never be replaced with martial law and that the state militia or the police should never interfere with industrial pursuits. Absolute freedom of speech and of the press were demanded, along with the right of peaceful assembly and the right to keep and bear arms. All rights in property were to be held by consent of the state and subject to the right of eminent domain. The platform proclaimed the rights of workers to organize and to abstain from work individually or collectively; to give information concerning labor disputes; to abstain from patronizing any individual, partnership, firm, or corporation; and to persuade others to do so by speech, print, or in any other manner. No private police or constabulary was to be allowed to operate in the state or to give testimony in any court. No citizen was to be disqualified from the franchise because of payment or nonpayment of taxes, or because of failure to fulfill any property ownership or educational requirement. The rights of citizens to vote were never to be restricted by requirements of fees upon registration, nomination, or voting.

The Socialists also proposed that the legislature should consist of one House of Representatives and that upon the demand of three counties or of five percent of the voters, the legislature should refer to the people any new proposed law or measure for adoption, ratification, or rejection. Insofar as the judicial system was concerned, judges were to be elected by direct vote of the people, the state was to conduct the defense of criminal trials as well as the prosecution free of charge, and neither capital punishment nor money fines were to be exacted for any crime. There was to be no conviction without a trial by jury. Nor was there to be any imprisonment for debt and all household goods, implements, and homesteads were to be exempt from levy under execution.

Short terms for elective officers were demanded, together with the election of United States Senators by direct vote of the people. The platform also advocated the recall of any officer upon the presentation of a petition signed by one percent of the voters, whereupon a new election would be ordered.

195. For the text of the Socialist Party platform for Pima County see *Pima County Socialists and the Labor Party in Field: Excommunicate Those who Have Joined Other Parties*, THE TUCSON CITIZEN, Aug. 20, 1910, at 1. The author was unable to find a record of any Socialist platform from Cochise, Maricopa, or Mohave counties.

No indirect taxes were to be levied by the state or by any political division and the taxes that were levied were to be exacted from those who were most able to bear them, the "possessing" class. A maximum work day of eight hours and at least a day and a half of rest in every week were also proposed. All wages were to be paid at least once a week. The platform also advocated that the legislature be required to adopt a child labor act, an employers' liability act, and sanitary conditions for workshops. All education and necessary textbooks, supplies, meals, and clothing were to be free. Finally, the constitution was to be subject to amendment by majority vote, and the proposed amendments were to be initiated and voted upon under the rules governing legislative matters brought through the initiative and referendum process.

Plainly, the Socialists were bent on blazing a new trail, but it turned out to be a path that attracted very few followers.[196] As will be seen later, the Socialists failed to elect a single delegate to the constitutional convention.[197] Likewise, the Labor Party failed to elect any delegates,[198] even though the Labor platform was far less radical than that of the Socialists.

6. Tort Liability and the Platforms

Of the four parties that actively sought to elect delegates to the constitutional convention, only the Democratic, Labor, and Socialist Parties raised the subject of tort liability in their platforms. Most Republican platforms were very general, but tort liability was not an issue that was mentioned even in the platforms that contained specific proposals. In fact, when the subject of tort liability was addressed in any of the platforms it was done with a very narrow focus. Only five Democratic platforms[199] out of the ten for which there is an existing record[200] thought the subject of tort liability was important enough to be addressed as part of the campaign to elect delegates. Moreover, with possibly one exception, the proposal endorsed by these five platforms consisted only of an employers' liability act patterned after the federal statute governing interstate railroad workers.[201] Even the Labor and Socialist Party proposals were limited to the adoption of an employers' liability act.[202]

196. The Socialist Party was equally out of step at the national level as its proposals to radically reform the political and economic systems won little support during this era. *See* PARKES, *supra* note 181, at 544.

197. *See infra* note 246 and accompanying text.

198. The Labor Party did have an impact on the election of delegates in at least one county, although it was not the result they probably preferred. *See infra* note 243 and accompanying text.

199. The five counties are Cochise, *Democratic Candidates and Platform,, supra* note 135; Navajo, *Democratic Convention Held Last Saturday, supra* note 135; Pima, *Democratic Platform is Progressive and Popular, supra* note 135; Pinal, *Democratic Convention, supra* note 135; and Yavapai, *Radicals Control Democratic Convention, supra* note 135.

200. *See supra* notes 128–135.

201. The first Federal Employers' Liability Act, enacted in 1906, was held unconstitutional as exceeding the power of Congress, in that it applied to workers who were engaged in intrastate commerce when injured as well as those engaged in interstate commerce. A second act was passed in 1908, but it was limited to employees engaged in interstate or foreign commerce thereby obviating any constitutional impediment. It was held to be constitutional. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 577 (5th ed. 1984).

202. *See supra* text accompanying notes 177, 195–96.

To be sure, these platform proposals regarding tort liability were meant to cover more employees than just intrastate railroad workers in Arizona, but it is worth noting that the federal act which was suggested as a model was quite conservative in the changes it had wrought for the workers affected by it. Liability under the federal legislation was still based on negligence of the employer, confirming the common law on the subject, with the only real changes being abolition of the fellow-servant rule and inclusion of a rule of comparative negligence in lieu of the existing rule that contributory negligence was a complete bar.[203] The common law rule of assumption of risk was not affected by the contemporaneous federal statute, except in situations where the employer violated other statutes enacted for the safety of employees.[204] Even with such a modest model, only two of the Democratic platforms proposed that the constitution directly provide the changes in the common law regarding employer liability.[205] The three remaining Democratic platforms proposed that the constitution either direct or merely authorize the legislature to enact such a law,[206] thus giving the legislature some flexibility in its enactment and possible amendment.

On a more interesting note, four of the five Democratic county platforms advocating the adoption of an employers' liability act did not recommend any other limitation on the power of the legislature to make reasonable changes in tort liability rules and remedies found under the common law. At most, these four platforms advocated only provisions that would prohibit the Arizona Legislature from imposing the fellow-servant rule and contributory negligence as a complete bar to recovery for employment-related injuries. This, however, was not the case with the fifth county.

The convention in the fifth county did propose that there should be some broader restriction on the legislature's power over tort liability. In the only reference to such a restriction in any platform to elect delegates to the constitutional convention, the Navajo County Democrats made the following pronouncement:

> 1. We believe in the enactment of an Employees Liability Act, providing that all questions of law and fact in the matter of any suit against any corporation, firm or individual with reference to the death or injury of any employee thereof shall be triable by jury and that statutory limitation of damages be prohibited and denied. We believe and insist that negligence or carelessness or want of understanding of any co-laborer shall not constitute a defense to any action brought under the spirit of this Section.[207]

On its face, the language prohibiting statutory limitations on damages applies only to causes of action that would be governed by the proposed employers' liability act. Under such an interpretation, the legislature would be

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203. Federal Employers' Liability Act, ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51 to 60 (1988)).

204. *Id.*

205. These were the platforms of Cochise and Navajo counties. *See Democratic Candidates and Platform, supra* note 135; *Democratic Convention Held Last Saturday, supra* note 135.

206. These were the platforms of Pima, Pinal and Yavapai counties. *See Democratic Platform is Progressive and Popular, supra* note 135; *Democratic Convention, supra* note 135; *Radicals Control Democratic Convention, supra* note 135.

207. *See Democratic Convention Held Last Saturday, supra* note 135.

prohibited from placing any monetary limit on the amount of damages an employee could recover from an employer for an on-the-job accident. Although the language does not appear to admit other interpretations, the question of the full meaning probably is best left to the next section of this Article where the issue of tort reform is explored more fully in the context of the campaign to elect delegates to the constitutional convention. Before moving to that discussion, however, several points should be made.

None of the platforms that were adopted during the process of nominating candidates for delegate to the convention clearly proposed any general constitutional limitation on the power of the legislature to enact tort reform measures that might diminish an individual's rights under common law tort doctrines. When any limitation was mentioned, it appeared, at least on its face, to be within the context of proposed changes in tort liability arising out of employment situations. Even then this type of suggestion, although proposed in each of the Labor and Socialist platforms, was advanced in less than one-half of the Democratic platforms. Moreover, there was only one platform that suggested a limitation on legislative power that went beyond that which was implicit in abolishing the fellow-servant doctrine and altering the effect of contributory negligence. The only reference to the broader restriction of prohibiting the legislature from limiting tort damages came in a Democratic platform from Navajo County, a county that, at least at first glance, was not the most likely county to have proposed a restriction on the power of the legislature to limit tort actions in any manner. One would have thought that the issue, if it were to be proposed at all, would have been proposed, for example, by a Cochise County convention, given that Cochise County was probably the most labor oriented county in the territory at the time or at least by a convention in one of the other counties where labor had a stronger voice in political matters.

Thus, as with any good mystery, the reason for the Navajo County provision is not readily apparent. Navajo County was a county whose main economic activities were sheep ranching, cattle ranching, and lumbering, and whose residents made up only about five percent of the total population of the territory in 1910.[208] Why did the Democrats of this out-of-the-way county include a platform provision restricting the legislature's power to limit tort damages when no other county convention saw fit to do so? If there is an explanation, perhaps the clues are to be found in the campaigns to elect the delegates to the constitutional convention. And, oddly enough, the best clues may be found in the statements of Republicans who seemed not to care about the issue of employer tort liability, except to use it in an attempt to hoist one of the Democratic candidates from Pima County on his own petard.

D. The Campaign to Elect Delegates and the Issue of Tort Reform

Most of the county conventions were held by the third week of August of 1910.[209] Once convention delegates had completed their tasks of developing platforms and nominating candidates, there was less than a month remaining before the September 12 election. In the little time remaining, the candidates threw themselves into the campaign with great enthusiasm, particularly in the

208. Navajo County had 11,471 residents in 1910, which was about 5.6% of the total population (204,354) of the territory. WALKER & BUFKIN, *supra* note 27, at 61.

209. *See supra* text accompanying notes 128–95.

more populous counties. In the main, the Republicans accused the Democrats of succumbing to fads and radical political notions, which if incorporated into the constitution would, in their opinion, surely spell defeat for statehood.[210] Consistency, however, was not necessarily a virtue as this kind of attack occurred at the same time the Republican aligned *Tucson Citizen* was charging that the heads of the Democratic slates in Cochise and Pima counties were mere fronts for distinctly nonradical corporate interests, particularly the managers and owners of the Southern Pacific Railway and the Copper Queen Mine, who, it was asserted, wanted to continue to dominate the new state.[211] The Democrats and their supporters responded by calling the Republicans "standpatters"[212] and accusing them of trying to get their way by frightening the people into believing that the constitution must be written to please President Taft and the Republicans in Congress, or else the constitution would not be approved.[213]

Newspapers were rarely nonpartisan in their reporting of the campaign, and often unabashedly aligned themselves with one of the two major political parties. Whether this was the reason or not, the Labor and Socialist Parties received very little press coverage. Be that as it may, the partisanship did produce some interesting exchanges on the editorial pages. For example, *The Arizona Republican* was particularly hostile when it came to the *Arizona Gazette*, a fellow Maricopa County newspaper. The latter had been a supporter of Republican causes until the Maricopa Republicans refused to support a constitutional provision for the initiative and referendum, a position that the territorial Republican Party had supported as recently as 1898.[214] Prior to the county convention the *Gazette* had implored the Maricopa County Republicans to again endorse the initiative and referendum.[215] Upon the party's failure to do so, the paper published an editorial simultaneously attacking the Republicans and announcing its support for the Democratic nominees for delegate.[216] This turn of events incensed the editors of *The Arizona Republican*, at first causing them to make snide remarks about their new rival, but eventually the exchanges became more caustic.[217] In response, the *Gazette* accused the *Republican* of being the

210. *See, e.g., The Ives Platform,* THE ARIZONA JOURNAL–MINER, Aug. 24, 1910, at 2; *Back up Cameron, Playing With Fire,* THE ARIZONA JOURNAL–MINER, Aug. 26, 1910, at 2; *The Issue in Arizona, The* ARIZONA JOURNAL–MINER, Aug. 28, 1910, at 2; *The Real Status of the Campaign,* THE ARIZONA JOURNAL–MINER, Aug. 30, 1910, at 2; *Only one Vital Issue,* THE ARIZONA JOURNAL–MINER, Sept. 1, 1910, at 2; *Statehood Depends on the Constitution,* DOUGLAS DAILY DISPATCH, Sept. 7, 1910, at 1; *Statehood Hangs in the Balance,* DOUGLAS DAILY DISPATCH, Sept. 7, 1910, at 2; *Morrison Appeals to the Common Sense of Citizens of Arizona, Give no Eastern Senator Chance to Defeat Statehood,* DOUGLAS DAILY DISPATCH, Sept. 8, 1910, at 1.

211. *See* THE TUCSON CITIZEN, Aug. 23, 1910, at 4; *Farcical Attack on Corporations,* THE TUCSON CITIZEN, Sept. 11, 1910, at 2.

212. *See, e.g.,* ARIZONA BLADE–TRIBUNE, Aug. 27,. 1910, at 2; *The Platform,* ARIZONA GAZETTE, Aug. 15, 1910, at 10.

213. *See, e.g., Democratic Ticket,* THE BISBEE DAILY REVIEW, Sept, 11, 1910, at 10; *Shameless in Nakedness,* DOUGLAS DAILY INT'L, Sept. 6, 1910, at 1.

214. *See A Platform to be Proud of,* ARIZONA GAZETTE, Sept. 1, 1910, at 1.

215. *See The People's Right,* ARIZONA GAZETTE, Aug. 8, 1910 at 8; *A Republican Duty,* ARIZONA GAZETTE Aug. 11, 1910, at 8; *A Last Appeal,* ARIZONA GAZETTE Aug 12, 1910, at 10.

216. *See Notice,* ARIZONA GAZETTE, Aug. 15, 1910, at 10.

217. For example, immediately after *The Gazette* switched its support to the Democratic candidates, *The Arizona Republican* referred to it as being as welcome in the Democratic ranks as a skunk, *see One Arriving Sinner Causes More joy, (NIT) Than Would be Felt by the Democracy,* THE ARIZONA REPUBLICAN, Aug. 16, 1910, at 2, but by the time the campaign to

organ of the Santa Fe Railroad and other corporate interests.[218] These diatribes between the two dailies continued throughout the campaign.[219]

Elsewhere in the territory, similar interchanges occurred. For example, one Cochise County Democratic newspaper characterized *The Tucson Citizen,* outspoken in its support for Republicans, of being "the political sewer through which most of the filth of the campaign is being pumped."[220] Equally partisan, if more subtle, attitudes were evidenced by practices like that of some newspapers, mostly rural ones, that conveniently neglected to publish any news at all about the activities of the opposing party.[221] All in all, however, the media in one way or another covered the issues of the campaigns quite thoroughly, even though a reader readily could discern which slate of candidates a particular newspaper supported and which it opposed. The newspapers knew where they stood on the issues and were determined to persuade their readers to take the same stance.

In the campaign to elect delegates to the constitutional convention, the main issues were those arising from proposals to adopt the initiative, referendum, and recall. In general, the Democrats favored these proposals, while the Republicans opposed them. The debates were vigorous. The argument for including these measures in the constitution was that they assured popular control of the government.[222] The opposing arguments ranged from the political expedient—President Taft was opposed and would veto the constitution if it contained such items[223]—to an appeal to constitutional principle—their inclusion would obviate the republican form of government guaranteed by the United States Constitution.[224] No other issues received as much attention as these three. In fact, it seemed that there was little Republican opposition to the other planks in the Democratic platforms.

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elect delegates really got underway the editors of *The Republican* came more to the point and were referring to their rival as "[T]he lying corrupt Gazette." *See Republican Ticket,* THE ARIZONA REPUBLICAN, Aug. 28, 1910, at 2.

218. *See An Insult,* ARIZONA GAZETTE, Aug. 29, 1910, at 2.

219. *See, e.g., Editor of Organ has Mislead Col. Roosevelt,* ARIZONA GAZETTE, Sept. 3, 1910, at 1; *The Daily Vaudeville,* ARIZONA GAZETTE, Sept. 3, 1910, at 2; *They Won't Appear,* THE ARIZONA REPUBLICAN, Sept. 4, 1910, at 2; *Inviting Disaster,* THE ARIZONA REPUBLICAN, Sept. 7, 1910, at 2.

220. *Editorial Notes,* DOUGLAS DAILY INT'L, Aug. 26, 1910, at 1, 5.

221. For example, the Nogales newspaper, which aligned itself with the Republicans, printed only a terse announcement that the Democrats of Santa Cruz County had held their convention and that "[i]t is reported that the platform declares for the initiative, referendum and the recall." *Democratic Convention, supra* note 133. This paucity of coverage of the Democrats' platform was probably no coincidence since the Republican platform for Santa Cruz County also supported the initiative, referendum, and recall. *Bracey Curtis Nominated, supra* note 158. After this public service, *The Oasis* never mentioned the Democrats again during the campaign.

222. *See, eg., The Gazette's Position,* ARIZONA GAZETTE, Aug. 15, 1910, at 10; *Strengthens Government,* ARIZONA GAZETTE Aug. 29, 1910, at 2; *Democratic Ticket,* BISBEE REVIEW, Sept. 11, 1910, at 10. The interest in the initiative, referendum, and recall was a mainstay of the Progressive Movement throughout the nation which in large part sought to extend democratic control by the people. *See supra* text accompanying note 186.

223. *See, e.g., Working Against Statehood,* DAILY SILVER BELT, Aug. 28, 1910, at 2; *Republican Buncombe,* DOUGLAS DAILY INT'L, Aug. 30, 1910, at 1; *Working Against Statehood,* THE TUCSON CITIZEN, Aug. 26, 1910, at 4; *How to get Statehood,* THE TUCSON CITIZEN, Aug. 27, 1910, at 4.

224. *See, e.g., Convention Completes Work,* ARIZONA GAZETTE, Aug. 15, 1910, at 1; *Statehood Paramount Issue, Says Kingan,* THE TUCSON CITIZEN, Aug. 25, 1910, at 7.

As to the subject of tort reform, it was virtually a nonissue in the campaign for election of delegates to the constitutional convention. From time to time, Democratic candidates for delegate confirmed in their speeches that they supported the adoption of an employers' liability act, but little else was said about tort reform.[225] One prominent attorney running on the Democratic platform from Cochise County did state that he supported the adoption of a workers' compensation scheme because he felt an employers' liability act modeled on the federal legislation was not sufficient,[226] but he appeared to be alone in his position during the campaign. As for the Republicans, there was no express opposition to the employers' liability proposal,[227] and very little reaction to the concept of a workers' compensation system.[228] Even the general charge by the Republicans that the Democrats were proposing radical ideas did not lead to an attack on the idea of expanding employer liability. That indictment was illustrated more by reference to Democratic proposals for the initiative, referendum, and recall. Of course, the Labor and Socialist Parties were not opposed to an employers' liability act, or probably to a workers' compensation act either, for they both had adopted platforms advocating the former.[229] The idea of restricting the power of the legislature to limit damages, whether by means of an employers' liability act, or otherwise just did not come up except in one situation where it was used to attack the credibility of a prominent Pima County resident running on the Democratic ticket.

Among the candidates for nomination by the Pima County Democrats was a man named Eugene S. Ives. Ives was a long time Democrat who had served as President of the Council of the Territorial Legislature in 1901 and 1903 while living in Yuma. His main clientele were some of the most powerful corporations in the territory, not the least of which was the Southern Pacific Railway. Nonetheless, Ives was a loyal and respected Democrat and was nominated as a candidate on the Pima County Democratic slate.[230] Towards the end of the campaign, he was implicated in a story in *The Oasis*, a Republican newspaper in Nogales, of having initiated and secured while a member of the territorial legislature in 1901 the passage of a bill that placed a $5000 cap on damages in wrongful death cases.[231] The story basically accused Ives of being personally aligned with

225. *See, e.g., Fight of Corporations on Democratic Ticket,* ARIZONA DAILY STAR, Sept. 11, 1910, at 1; *Candidates of People Speak at Courtland,* BISBEE DAILY REVIEW, Sept. 4, 1910, at 1.

226. The attorney was Everett E. Ellinwood, reputed to be general counsel to the Copper Queen Mining Company. *Democratic Candidates Squarely for Platform,* DOUGLAS DAILY INT'L, Aug. 27, 1910, at 4.

227. In one of the few pieces by a Republican newspaper to mention the prospect of an employers' liability act, the editorial did not oppose the idea, but argued that it should not be in the constitution, rather it should be left to the legislature to adopt it. *Democratic Platform Restrictive,* DOUGLAS DAILY DISPATCH, Aug. 23, 1910, at 2.

228. An article in *The Arizona Republican* attacked E.E. Ellingwood, *see supra* note 226, for advocating the workers' compensation plan, but stated in the same piece that it would cost the Copper Queen Mine, for whom Ellingwood was accused by *The Republican* of fronting as a candidate, thousands of dollars. THE ARIZONA REPUBLICAN, Sept. 4, 1910, at 2.

229. *See supra* text accompanying notes 177, 195–96.

230. E. E. Ellingwood, another attorney representing corporate interests, was nominated as a candidate for delegate to the constitutional convention by the Democrats of Cochise County. *See supra* note 226 and accompanying text.

231. *The Great Democratic Rally at the Lyric Theatre Tuesday Evening,* THE OASIS, Sept. 3, 1910, at 1.

those corporations whose interests were inimical to those of the people and especially those of Democrats laboring for the mines and railroads.

Specifically, the *Oasis* story alleged that the legislation limiting damages in wrongful death cases was in response to a case where the relatives of a man named Tomlinson, who had been killed in Casa Grande by a Southern Pacific train, sued and collected a total of $50,000 from the railroad.[232] The story further stated that the legislative action to limit such damages to $5000 came in the "very next" session of the legislature after the supreme court of the territory affirmed the award.[233] The story strongly implied that Ives was involved, but presented few facts establishing such involvement. This charge not only appeared in other newspapers,[234] it became the basis for *The Tucson Citizen* to demand that Ives explain his position on a number of matters. Did Ives favor removing the $5000 limit as the amount of damages that could be recovered from a railroad for the loss of a human life?[235] Did he favor submitting the question of damages for injury or death to an impartial board of arbitrators and did he favor abolishing the fellow-servant rule?[236] The attack by the *Citizen* was unrelenting as the time to vote for delegates to the constitutional convention drew near.[237]

Other than the attack on Ives, there is little to be learned from editorials and other newspaper reports about any disagreement between the political parties over tort reform. Not only were there no attacks by Republicans on the Democratic platforms advocating the adoption of an employers' liability act, with or without a limit on damages, the attack by *The Tucson Citizen* on Ives not only seemed to endorse the idea of an employers' liability act, but also implied that it should be one without a limit on damages.[238] One of the main features of the Federal Employers' Liability Act, which appeared to be the model being advocated by the Democrats, Labor Party, and Socialists, was the abolishment of the fellow-servant rule.[239] It, however, did not alter the common law measure of damages. Thus, by publicly demanding to know whether Ives, the leading Democratic candidate from Pima County, would support removal of the $5000 limit on wrongful death damages and the abolition of the fellow-servant rule, one of the leading Republican newspapers in the territory could be seen as endorsing these changes in tort law. At the very least, the editors of the *Citizen* did not publicly oppose the proposed reform. In any event, nothing in the newspaper reports covering the campaign indicates any serious differences over possible changes in tort law.

Despite grandiose predictions of victory by Republicans,[240] citizens of the territory awoke on September 13 to find that there had been a landslide for the

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232. *Id.*
233. *Id.*
234. *See, e.g., Statehood the Only Vital Issue in Arizona Today,* DOUGLAS DAILY DISPATCH, Aug. 28, 1910, at 7.
235. *Questions for "Senator" Eugene S. Ives to Answer,* THE TUCSON CITIZEN, Aug. 26, 1910, at 2. This challenge, at the very least, was misleading because the limit on wrongful death damages had been removed in 1909, the previous year. *See infra* note 285 and accompanying text.
236. *Questions for "Senator" Eugene S. Ives to Answer, supra* note 235.
237. *See Ives' Trick for More Votes Fails,* THE TUCSON CITIZEN, Sept. 11, 1910, at 1.
238. *See also supra* note 227.
239. *See supra* text accompanying note 203.
240. *See, e.g., Victory is Forecasted Governor Sloan Believes Republicans Will Elect 28,* THE ARIZONA REPUBLICAN, Sept. 12, 1910, at 1; *Election is Going Republican,* BISBEE

Democratic candidates.[241] There were dire predictions by the Republican press that statehood had been seriously jeopardized;[242] nevertheless, the citizens of the territory—at least the male citizens—had spoken. Out of fifty-two delegate seats, the Democrats captured forty-one. The Republicans elected only eleven, and five of those came from Pima County where, had it not been for the Labor Party splitting the vote with the Democrats, there might not have been any Republicans elected from that county.[243] The remaining Republican victors consisted of two from Coconino County, one of the few Republican strongholds in the territory, and one delegate each from Gila, Navajo, Santa Cruz, and Yavapai counties.[244] The Democrats made a clean sweep of Cochise, Graham, Maricopa, Pinal, and Yuma counties; took the only delegate seat from Apache and Mohave counties; and beat the Republicans five to one and six to one in Gila and Yavapai counties, respectively.[245] The Labor Party and the Socialists failed to elect any of their candidates.[246] The strategy of a partisan campaign for delegates clearly had worked to the advantage of the Democrats.[247] Now, after years of control by Republicans in Washington, they eagerly looked forward to the work of drafting the constitution for the new state of Arizona.

III. TERRITORIAL TORT LAW

As a necessary prerequisite to examination of the proceedings of the constitutional convention with regard to tort issues, the provisions that resulted, and the ensuing judicial interpretations of constitutional limitations on the Arizona Legislature's power to alter common law rules of liability and damages in personal injury cases, one should review the general state of personal injury law in the Arizona territory, as well as the specific aspects that were raised in the election campaign. Several questions immediately come to mind. Was the concern about treatment of on-the-job injuries peculiar to Arizona or was it shared by citizens elsewhere? In addition, there are further questions about the facts underlying the story about Eugene Ives and the *Tomlinson* case. Although the newspaper stories attacking Ives appeared after the various party platforms had been adopted, did the events reported on play some part in the inclusion in the Navajo County Democratic platform of a provision advocating prohibition of legislative limitations of damages in employer liability cases?[248] If so, why was the matter not addressed in any of the other platforms advocating the adoption of

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EVENING MINER, Sept. 12, 1910, at 1; *Reports From all Over Territory Indicate Republican Landslide,* THE TUCSON CITIZEN, Sept. 11, 1910, at 1; *Gila, Graham and Cochise Counties to Give Republicans Overwhelming Majorities,* THE TUCSON CITIZEN, Sept. 11, 1910, at 2.

241. *See, e.g., Direct Legislation Wins All Over New State of Arizona—Only Nine Votes Will Be Opposed in Convention,* ARIZONA GAZETTE, Sept. 13, 1910, at 1; *Democrats Triumph,* DOUGLAS DAILY INT'L, Sept. 13, 1910, at 1. *But see Pima County Elects Five Republicans: Labor Vote was Surprisingly Large and Caused the Defeat of the Entire Democratic Ticket,* ARIZONA DAILY STAR, Sept. 13, 1910, at 1.

242. *See, e.g., Arizona Accepts Risk of Losing Statehood,* THE ARIZONA REPUBLICAN, Sept. 13, 1910, at 1.

243. *See Labor Party Takes Off Total,* ARIZONA GAZETTE, Sept. 14, 1910, at 12.

244. For a complete breakdown of the membership of the Arizona Constitutional Convention of 1910 by county, political party, occupation, and residence see WAGONER, *supra* note 20, at 462–63.

245. *Id.*

246. *Id.*

247. *See supra* text accompanying notes 84–91.

248. *See supra* text accompanying note 207.

an employers' liability act? Moreover, did the facts surrounding the *Tomlinson* case and the subsequent legislative cap on wrongful death damages have any effect on actions taken at the constitutional convention regarding liability and damages for personal injuries? In short, did events of which there is little present, explicit evidence affect the treatment of tort issues in the constitution?

Neither the political party platforms that were developed at the grass roots level nor the local campaigns to elect delegates to the constitutional convention during the summer of 1910 provides evidence of any serious concerns about territorial tort law except for rules governing employee injuries. To the extent there was concern, it was not unique to Arizona. American tort law generally was still in its adolescence.[249] As to personal injuries, the industrial revolution had spawned a marked increase in the number of work-place accidents, but at the same time employee rights to compensation had diminished. In the middle of the nineteenth century the burden had been placed on the plaintiff by the courts to prove fault before recovery could be had in tort.[250] And to make matters even more difficult for an injured employee, under the common law, not only did the defense of contributory negligence provide a complete bar, the employer could also invoke assumption of the risk and the fellow-servant doctrine to defeat a claim.[251] Clearly, the situation was out of balance for on-the-job accidents and even though the courts were beginning to right the balance,[252] the judicial process was painfully slow. More drastic action was necessary to make the tort system more fairly responsive to employee injuries. In fact, the problem was not unique to America.

The English had already adopted an employers' liability act in 1880[253] and when it proved inadequate to redress the imbalance in the law that governed industrial accidents, largely because it failed to deal effectively with the inequities under the defense of assumption of risk,[254] they turned to a workers' compensation system.[255] Each of these statutes was an attempt to increase employer responsibility for on-the-job injuries, but this increase in liability was accompanied by a reduced level of compensation under the statutes as compared to the level of compensation available at common law. England was not alone in recognizing that industrial accidents called for a different system of compensation. European countries, especially Germany, were also adopting legislation designed to deal with the problem.[256] This legislative activity did not go unnoticed beyond the borders of these countries as a similar pattern of activity began to occur in the United States.

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249. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 3–19 (1980).

250. This change is usually attributed to the influence of Chief Justice Shaw's opinion in Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850). *See also* KEETON ET AL., *supra* note 201, § 30, at 239.

251. *See* 1 ARTHUR LARSON, WORKMEN'S COMPENSATION § 4.30 (1990).

252. *Id.*, § 4.40.

253. This act, unlike the employers' liability acts that were subsequently adopted in the United States, changed the common law measure of damages in that compensation could not exceed the estimated earnings of a similarly situated employee during the three years prior to the accident. Employers' Liability Act of 1880, 43 & 44 Vict., ch. 42, § 3 (Eng.).

254. *See* JAMES H. BOYD, COMPENSATION FOR INJURIES TO WORKMEN § 18 (1913).

255. *See* DAVID G. HANES, THE FIRST BRITISH WORKMEN'S COMPENSATION ACT 1897 (1968).

256. *See* BOYD, *supra* note 254, § 8.

Around the turn of the century in America, over twenty states and the federal government enacted statutes abrogating or modifying, either generally or in particular industries, some or all of the common law defenses available to employers in tort suits by employees for injuries caused by on-the-job accidents.[257] However, as in England and Europe, these changes also proved less than adequate to the task and there was much interest in the United States in the new English and German compensation systems, and that interest led to study commissions in several states recommending that similar compensation systems be adopted in this country.[258] However, it was not until 1910 that New York broke with American tradition and began the parade of states to replace common law tort actions as the remedy for work place injuries with the remedies under a workers' compensation statute.[259]

Thus, during the period in which the enabling legislation for Arizona statehood was being considered and eventually enacted by Congress, there was indeed considerable agitation for tort reform in the United States. This agitation, however, was directed only to proposals for change in the rules of liability and remedies available to employees injured on the job. The automobile, much less the airplane, was yet to be a menace to life and limb. Problems with products liability and medical malpractice were many years and two world wars away. It should come as no surprise then that the contemporaneous nationwide concern over the treatment of victims of industrial accidents was also expressed during the process of choosing those persons who would draft a constitution for the new state of Arizona. The existing system for remedying workplace injuries satisfied neither the needs of employees or employers and it is fair to say that there was a consensus among most of those concerned with the problems—both in Arizona and the nation at large—that the time for change had arrived.[260]

This consensus may well explain why the Democratic platform planks that advocated a constitutional provision mandating changes in the tort law governing employer liability for on-the-job injuries provoked so little response in the campaign. Yet, this explanation does not reveal much about the reasons why one Democratic platform went further and called for a prohibition on any legislative limitation on damages for personal injury in such cases. Perhaps there was another more parochial reason. Did the fact that tort damages once had been limited for fatal accidents and that this limit might have been brought about by powerful corporate interests explain why the Democratic platform for Navajo

257. *Id.*, § 3.
258. *Id.*, § 8.
259. This statute was declared unconstitutional by the New York Court of Appeals the next year, but the New York Constitution was amended in 1913 to specifically authorize the adoption of a workers' compensation act. Such an act was immediately enacted by the New York Assembly. *See infra* note 440 and accompanying text.

Although a majority of states went on to pass workers' compensation legislation after this, the pall of the New York court decision hung over compulsory workers' compensation legislation in the United States until 1917. In that year the United States Supreme Court upheld the constitutionality of acts in three different jurisdictions, on the basis of the state's police power, against challenges that they violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Within three years after these decisions, all but six states and the District of Columbia had passed workers' compensation laws, but it took until 1948 before the coverage was completed by all states. *See* Roger C. Henderson, *Should Workmen's Compensation Be Extended to Nonoccupational Injuries ?*, 48 TEX. L. REV. 117, 118 (1969).
260. *See* BOYD, *supra* note 254, § 9.

County called for this constitutional limit on the power of the legislature? An examination of the events surrounding the *Tomlinson* case and the subsequent legislative action, however, proves once again that it is risky to believe everything one reads in the newspaper, even a 1910 newspaper, and particularly stories written during a political campaign.

It is true that on June 24, 1891 a man named Thomas Tomlinson, a merchant living in the village of Casa Grande, was killed by a Southern Pacific train as he attempted to cross the railroad tracks.[261] Thereafter, the then huge sum of $50,000 was awarded in a wrongful death action brought by his wife on behalf of herself, their four children, and his parents.[262] An appeal was taken to the Supreme Court of the Territory of Arizona, but, contrary to the 1910 story in the territorial newspapers, the jury award was not affirmed, much less collected. After the jury verdict, the railroad moved the trial court for a new trial on the grounds that the award was excessive. The deceased's wife, on behalf of herself and the other beneficiaries, apparently agreed because she acquiesced to a *remittitur*.[263] The trial court then proceeded to find that the damage award was excessive and ordered the *remittitur*, reducing the sum awarded by the jury to a total of $18,002.[264] On review, the territorial supreme court agreed that the jury award was clearly excessive and affirmed the award as reduced by the trial court.[265] The case was then appealed to the Supreme Court of the United States where it was reversed on the grounds that the wife had no authority to agree to a reduction in the shares awarded to the other beneficiaries and, since the lower courts had found that the verdict was excessive, the defendant railroad was entitled to a new trial.[266] The case was remanded to the territorial court, but it must have been settled because there is no further record of any court proceedings. Thus, the outcome of the *Tomlinson* case would not seem to engender too much concern that the railroads were being mulcted in damage suits. Nonetheless, the territorial legislature did amend the wrongful death statute by restricting damage awards for fatal accidents to a maximum of $5000. But was the amendment in response to the *Tomlinson* case?

It is certainly far from clear whether there is any connection at all between the *Tomlinson* case and the amendment to the territorial wrongful death statute. First, the story in the Nogales newspaper is in error in several respects. The story intimated that the Supreme Court of the Arizona Territory affirmed the jury verdict of $50,000 when it stated that it was collected.[267] It then said the $5000 cap was put on such awards in the "very next" legislative session.[268] In fact, as explained above, the jury verdict of $50,000 was not affirmed by the territorial supreme court; rather it affirmed the trial judge's award, after *remittitur*, of $18,002.[269] Even then, this award was vacated by the United States Supreme

261. S. Pac. Co. v. Tomlinson, 4 Ariz. 126, 33 P. 710 (1893).
262. *Id.*
263. The jury verdict awarded the wife and four children $8000 each and the deceased's parents $5000 each. The trial judge reduced the award to the wife to $6000, the awards to the children to $3000 each, and the awards to the parents to $1 each. *Id.* at 131, 33 P. at 710.
264. *Id.* at 132–33, 33 P. at 710.
265. *Id.* at 135, 33 P. at 712.
266. S. Pac. Co. v. Tomlinson, 163 U.S. 369 (1896).
267. *See supra* text accompanying note 232.
268. *See supra* text accompanying note 233.
269. *See* 4 Ariz. at 135, 33 P. at 712.

Court in 1896 and the case was remanded for a new trial.[270] The fact that the damage award was reduced to approximately one-third of that contained in the verdict and then completely vacated casts some doubt on whether there was any legislative reaction to the *Tomlinson* case. This doubt is enhanced when one considers the time frame over which the events transpired and the context within which the territorial legislature acted to limit damages in wrongful death cases.[271]

It was not until 1901, eight years after the decision by the territorial supreme court and five years after the United States Supreme Court acted,[272] that the territorial legislature passed the amendment to limit recoveries in wrongful death actions.[273] Moreover, the 1901 amendment was enacted as part of a two year project to revise the entire territorial code.[274] In the process, the legislature fundamentally revised the wrongful death statute so that there was not only a monetary limit on recovery, but also a change in the measure of recovery from one based on the loss to the survivors to one based on the loss to the deceased's estate.[275] In addition, the Code Revision Commission apparently copied the new version, including the $5000 limit, from the then existing Wyoming wrongful death statute.[276] Moreover, Wyoming was just one of many states that had placed monetary limits on wrongful death recoveries around this time.[277]

Unfortunately, however, copies of the Code Revision Commission report cannot be located, if they were ever preserved in the first place. Equally disappointing is the fact that none of the newspapers of the day found the change in the wrongful death statute of sufficient interest to comment on it. Thus, there is no way to know for certain the reasons why the Code Revision Commission recommended these changes in the territorial wrongful death statute.

If all this background is not enough to cast serious doubt on any connection between the *Tomlinson* case and the legislative action in 1901, it also turns out that Eugene S. Ives did not introduce the bill that contained the cap on wrongful death damages. It was introduced by Pinal County Senator George P. Blair, the Chairman of the Council Judiciary Committee, who earned his living as the manager of the Mammoth Mine.[278] Ives was merely the President of the Council and voted for the bill along with the two Republicans and six other Democrats who were present at that particular session of the twelve member

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270. *See* S. Pac. Co. v. Tomlinson, 163 U.S. 369 (1896).

271. The original wrongful death statute enacted as part of the first territorial code in 1864, REV. STAT. OF ARIZ. ch. 54 (Howell Code 1864), was copied verbatim from the original English wrongful death act, popularly known as Lord Campbell's Act. *See* Fatal Accidents Act of 1846, 9 & 10 Vict., ch. 93. The Arizona Act was subsequently amended, but the 1887 version, which was in effect in 1901 and governed the *Tomlinson* case, still in all essentials followed the original English version. *See* S. Pac. Co. v. Wilson, 10 Ariz. 162, 85 P. 401 (1906): Under the 1887 statute, a new cause of action was created on behalf of the deceased's spouse, children and parents. Damages were measured on the basis of losses sustained by these beneficiaries. There was no monetary limit on the amount recoverable. *See* REV. STAT. OF ARIZ. §§ 2149, 2155 (1887).

272. *See supra* text accompanying notes 264–66.

273. *See* REV. STAT. OF ARIZ. §§ 2764–67 (1901).

274. *See* JOURNALS I, *supra* note 35, at 318–19.

275. *See* S. Pac. Co. v. Wilson, 10 Ariz. 162, 85 P. 401 (1906).

276. *Id. See also* WYO. REV. STAT. §§ 3448–49 (1899).

277. In 1893, twenty-two states had limits ranging from $5000 to $20,000 and this legislative practice persisted well into the early 1900's. *See* STUART M. SPEISER ET AL., RECOVERY FOR WRONGFUL DEATH AND INJURY § 7.1 (1992).

278. *See* JOURNALS I, *supra* note 35, at 43.

Council.[279] The Bill passed the territorial House of Representatives by a vote of twenty-one in favor and zero opposed, with three absent.[280] The House also was in the control of the Democrats by a majority of nineteen Democrats to five Republicans.[281] Thus, the fact that the $5000 cap was enacted with no recorded opposition would seem to belie the suggestion that the change was at the behest of some powerful political interest. It does not seem likely that a Democrat-controlled legislature would have adopted a $5000 limit on wrongful death recoveries in response to pressure from the Southern Pacific Railroad or any other corporate interests. It is more likely that the change merely came in as part of the code revision in 1901, particularly since it was not unusual to find monetary limits in wrongful death statutes at that time.[282]

Regardless of the reason for the cap, it was not in effect very long as it was removed before the end of the decade. If the reason why the $5000 limit on wrongful death damages was adopted is not entirely clear, the reason for removal is no more clear.[283] However, there is one interesting fact that indicates that there may be a connection between the removal and the Navajo County Democratic platform plank calling for a constitutional prohibition of any statutory limitation on damages for personal injury in employer liability cases.[284]

In 1909, the Twenty-fifth Legislative Assembly repealed the $5000 limitation in wrongful death cases.[285] The gentleman who introduced the repealer was none other than Senator William J. Morgan, a Democrat, from Navajo County.[286] Morgan was a member of the Twenty-first Legislative Assembly that passed the $5000 limit in 1901, but he was listed as being absent when the final vote on the bill was taken in the House of Representatives.[287] Morgan subsequently was nominated by the Democrats of Navajo County as a candidate for

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279. *Id.* at 225–26.

280. *Id.* at 531. For a breakdown of the 1901 Territorial Council by political party affiliation, *see* MCCLINTOCK, *supra* note 32, at 11.

281. *See* MCCLINTOCK, *supra* note 32, at 27.

282. *See supra* note 277.

283. There was no real explanation in the newspapers of the day, although the introduction and passage of the amendment to delete the monetary limit was noted in a few papers. *See, e.g.*, ARIZONA DAILY STAR, Jan. 31, 1909, at 1; *id.*, Feb. 9, 1909, at 1; *id.*, Mar. 11, 1909, at 1; ARIZONA REPUBLICAN, Jan. 31, 1909, at 8; *id.*, Feb. 9, 1909, at 1; *id.*, Mar. 11, 1909, at 8. *The Arizona Gazette* contained the only substantive comment: "It is claimed that by this measure [the bill to remove the $5000 limit] mining companies will be required to employ more expert labor, and that cheap foreign workers will be eliminated." ARIZONA GAZETTE, Feb. 25, 1909, at 6. In the only other newspaper comment found by the author, *The Holbrook Argus* merely stated that the bill removing the limit was a particularly good one. THE HOLBROOK ARGUS, Feb. 9, 1909, at 2.

284. *See supra* text accompanying note 207.

285. Act of Mar. 10, 1909, ch. 16, 1909 Ariz. Sess. Laws 33.

286. The following biography is found in THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 (John S. Goff ed., 1991) [hereinafter RECORDS]:

> MORGAN, WILLIAM, Democrat from Navajo County. Born County Kildare, Ireland, August 11, 1857. At age six came to America with parents and educated in the public schools of Chicago, Illinois. After his father died at an early age he became a messenger boy, later working in the stockyards. At age eighteen went to Texas and herded sheep. Came to Show Low 1879 and was a sheep herder, eventually owning large flocks. Justice of the peace, member of the sheep sanitary commission and the county board of supervisors. Member of the House of Representatives 1901, 1907 and of the Council 1909. Held stock interests until his death. Died Phoenix, April 23, 1938.

Id. at 1394.

287. *See* JOURNALS I, *supra* note 35, at 531.

delegate to the constitutional convention in 1910 and must have been present at the Democratic County Convention in Winslow at the time he was nominated and the platform was developed in August of that year.

Given Morgan's political experience and prominence,[288] he must have had considerable influence on the Democratic platform for Navajo County. It is reasonable to conjecture that he also was probably responsible for the plank calling for a constitutional prohibition on statutory limitations of damages in employer liability cases.[289] In addition to the fact that had he introduced the bill to remove the $5000 limit on wrongful death recoveries, he also introduced a bill in the same legislative session in 1909 to adopt an employers' liability act.[290] Thus, even though it may not be clear why the $5000 cap on wrongful death cases was enacted and then removed eight years later, the fact that William J. Morgan played a prominent role in removing it may explain how the Navajo County Democratic platform came to have the only plank advocating a constitutional prohibition on the legislature's power to limit recoverable damages for personal injury cases arising out of on-the-job accidents.[291] It is now time to turn to the constitutional convention itself.

IV. THE CONSTITUTIONAL CONVENTION OF 1910

In contrast to the flurry of newspaper stories about the campaigns to elect delegates, very little about what should be included in the constitution appeared in the newspapers after the election and during the remaining four weeks prior to the convening of the convention.[292] There was more written about who the president of the convention might be and about the jockeying for position of the potential candidates.[293] Among the prominent names mentioned for president

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288. Of the four candidates for delegate to the constitutional convention from Navajo County, Morgan polled 428 votes compared to 289, 268 and 251 for the other three candidates, respectively. Morgan was the only Democrat to be elected from Navajo County. The other delegate was James Scott, a Republican cattleman from Pinedale. *See* THE HOLBROOK NEWS, Sept. 16, 1910, at 5. For a biographical sketch of Morgan, see *supra* note 286.

289. *See supra* text accompanying note 207.

290. *See* JOURNALS I, *supra* note 35, at 166. Apparently, this bill would have abolished the rule that any contributory negligence of an employee would bar recovery and substituted in lieu thereof a comparative fault rule. However, it may have been applicable only to corporate employers. *See* THE ARIZONA REPUBLICAN, Feb. 21, 1909, at 1. In any event, the bill was indefinitely postponed. *See* JOURNALS I, *supra* note 35, at 201.

291. The fact that Navajo County contained some significant rail points during William Morgan's terms as a member of the Territorial Assembly may explain his interest in labor causes. In the late 1800's and early 1900's Holbrook became an important shipping center of the Atlantic and Pacific Railroad for cattle and sheep and Winslow had a rail yard containing a round house, machine shop, and other facilities. *See* Vada F. Carlson, *Navajo County*, *in* 1 ARIZONA THE GRAND CANYON STATE: A HISTORY OF ARIZONA 145–54 (1975). More than likely, a good number of the railroad employees formed an important part of Morgan's Democratic constituency.

292. The main concern was still over the initiative, referendum, and recall and whether President Taft would reject a constitution containing such measures. This concern was exemplified by a cartoon in *The Arizona Republican* as the convention was about to begin. It was based on Aesop's fable entitled "The Dog and the Shadow." It showed a dog labeled "constitutional convention" holding in its mouth a bone with "statehood" written on it as the dog peered at its reflection in a pool of water. The bone in the reflection was magnified and had "populistic–socialistic convention" written on it. Beneath the cartoon, was written the query: "Will it drop the bone for the shadow?" THE ARIZONA REPUBLICAN, Oct. 9, 1910, at 1.

293. *See* RICHARDS, *supra* note 20, at 3–7.

were those of E.E. Ellinwood, a corporate lawyer and conservative Democrat from Cochise County; George W.P. Hunt, a legislative leader and progressive Democrat from Gila County; and Morris Goldwater, a Democrat from Yavapai County who had served as Mayor of Prescott on a number of occasions and had defeated Hunt for president of the Council in the Twentieth Legislature in 1899.[294]

It was a foregone conclusion that the hopelessly outnumbered Republicans would have little to say about who the officers would be and how the convention would be run. The presence of a Democratic majority did not mean, however, that they would march in lockstep through the next sixty days of debating and voting. There were a number of delegates from the Democratic ranks who did not see eye to eye with each other on matters that were to be addressed during the convention. Thus, the battle was not so much between the Democrats and Republicans as between the conservatives from both parties and the more progressive Democrats.[295] Nonetheless, all speculation as to who would lead the convention was soon put to rest.

The convention was called to order at noon on October 10, 1910[296] and the delegates were administered their oath of office by Edward Kent, Chief Justice of the Territorial Supreme Court.[297] The delegates wasted no time in electing as president of the convention George W.P. Hunt,[298] the person agreed upon by the Democrats at their caucus earlier that day.[299] Hunt promptly appointed a seven member committee on rules and procedures and a thirteen member committee to suggest the standing committees for the convention.[300] William Morgan from Navajo County was the only delegate to serve on both committees.[301] On the second day, October 11, the Committee on Standing Committees reported and recommended twenty-four standing committees with a total of 147 members.[302] Under this proposal, excluding the president of the convention, forty-four delegates would have three committee assignments and eight would have two assignments.[303] The report was adopted the next day[304] and President Hunt announced his appointments on the morning of October 13.[305] Not one Republican was made chair of a committee, nor was attorney E.E. Ellinwood, the conservative Democrat from Cochise County.[306] The progressive Democrats clearly were in control.

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294. *Id.* at 3–6; *see also* RECORDS, *supra* note 286, at 1387–98.
295. *See* RICHARDS, *supra* note 20, at 21–25; WYLLYS, *supra* note 20, at 307.
296. *See* RECORDS, *supra* note 286, at 1.
297. *See id.* at 3.
298. *See id.* at 4.
299. *See Hunt President of Constitutional Body,* ARIZONA GAZETTE, Oct. 10, 1910, at 1.
300. *See* RECORDS, *supra* note 286, at 6.
301. *See id.* There were six Democrats and one Republican on the rules committee and ten Democrats and three Republicans on the committee on standing committees. See WAGONER, *supra* note 20, at 462–63 for the political affiliation of the members.
302. *See* RECORDS, *supra* note 286, at 10–11.
303. *See id.* at 10.
304. *See id.* at 17 and 19–20.
305. *See id.* at 21–22.
306. *See* RICHARDS *supra* note 20, at 13.

The thirteen member Judiciary Committee consisted of eleven Democrats and two Republicans, with ten members being lawyers.[307] A banker and a mining engineer, both from Yavapai County, and a minister from Maricopa County made up the other three members of the committee.[308] Cochise and Maricopa Counties had three representatives each on the committee and Yavapai County had two.[309] There were no representatives from Apache, Mohave, Navajo, Pinal or Santa Cruz Counties on the Judiciary Committee.[310]

With the appointment of the committees, the delegates were ready to begin their task of drafting a constitution. As a drafting body, the convention operated much like a legislature.[311] The members introduced "propositions," which were analogous to legislative bills. These were given a number, read on the floor of the convention and then assigned to the appropriate standing committee for study. After study, the committee would report back to the committee of the whole, often recommending a substitute proposition in lieu of the original. Frequently, there were minority reports from committee members. After the committee of the whole debated and approved a particular version of a proposition, it was reported to the convention for additional readings and finally passage. From the time of introduction through the final reading, each proposition kept its numerical identity even though it may have been amended or recommended for indefinite postponement. Upon final passage, however, the propositions had to be organized and compiled into articles of the constitution by the Committee on Style, Revision and Compilation.[312] The initial decision as to where a particular provision was placed in the final draft of the constitution was made by the Style Committee, a decision, as will be seen later, that could have very important legal consequences once the placement was adopted by the convention.

Under the rules of the convention no new matter was supposed to be introduced after October 31, which meant that the delegates had three weeks to draft and file their propositions. All in all, 153 propositions were introduced and considered by the delegates. As expected, the debates over the initiative and referendum[313] and recall,[314] particularly in applying the latter to the judiciary,[315] were nothing short of passionate and even eloquent at times.[316] Other proposi-

307. For the committee membership see RECORDS, *supra* note 286, at 21–22, and for their occupations see WAGONER, *supra* note 20, at 462–63.

308. *See* sources cited *supra* note 307.

309. For the committee membership see RECORDS, *supra* note 286, at 21–22, and for their county of residence see WAGONER, *supra* note 20, at 462–63.

310. *See* RECORDS, *supra* note 286, at 21–22.

311. WAGONER, *supra* note 20, at 470.

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> [This] committee was headed by the Harvard-educated Michael Cunniff who had served as editor of *World's Work*. His ability was attested to by the fact that he had been in Arizona only three years before being elected to serve in the convention. With the assistance of Mulford Winsor—a newspaper man from Yuma—Judge Wells of Yavapai, Ellinwood of Cochise, and Baker and Franklin from Maricopa, Cunniff edited the wording of the constitution and deserves most of the credit for its literary style.

Id.

313. *See* RECORDS, *supra* note 286, at 175–226, 228–236, 733–751.

314. *See id.* at 242–246, 260–270, 800–812, 919–922, 925–929.

315. *See id.* at 806–812, 920.

316. *Id.* at 198–205. This is a speech by Samuel L. Kingan, Republican delegate and attorney from Pima County, quoting from James Madison's "The Federalist" in arguing that the initiative and referendum run counter to the republican form of government guaranteed by

tions that evoked strong and sometimes heated debate related to such diverse subjects as prohibition,[317] women's suffrage,[318] judicial salaries,[319] taxation,[320] child[321] and alien labor,[322] licensing of medical practitioners,[323] and an educational requirement for voter qualification.[324] In comparison, although the propositions dealing with tort issues did spark debate, about as much time was spent arguing over who could practice medicine[325] as was spent debating tort reform.[326] Regrettably, however, there was almost no discussion of tort matters in the newspaper reports. Nonetheless, the evolution of the constitutional provisions limiting the power of the legislature to make changes in the common law of torts is important and well worth tracing out. Any attempt to interpret these provisions should be informed by what transpired at the convention.

Out of the 153 propositions introduced at the constitutional convention, there were nine that in some measure would affect the law of torts. This Article focuses on events surrounding the introduction and evolution of seven of these propositions. These seven formed the basis, or in some other way were related to the final versions, of Section 31 of Article II and Section 6 of Article XVIII, the constitutional provisions that place specific limitations on the authority of the legislature to modify actions for personal injury or death and the amount of damages that are recoverable in these actions.[327] The other two constitutional provisions impacting on tort law relate to the general authority of the legislature to change tort law, but, as explained below, they do not place specific or absolute restrictions on that branch of government.

Among the propositions that were introduced addressing the general authority of the legislative branch of government, there were provisions prohibiting the enactment of any special or local law limiting civil actions.[328] This kind of provision was fairly common in state constitutions[329] and did not prescribe any unique relation or division of authority between the judicial and legislative branches of government insofar as the power of the legislature to modify decisional law was concerned. Under this kind of constitutional provi-

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the United States Constitution and imploring the convention to reject these measures. *See also id.* at 205–08. This is a speech by Edward M. Doe, Republican delegate and territorial judge from Coconino County.

317. *See id.* at 411–17.
318. *See id.* at 274–88.
319. *See id.* at 357–61.
320. *See id.* at 474–90.
321. *See id.* at 440–47.
322. *See id.* at 450–54.
323. *See id.* at 634–42, 752–58.
324. *See id.* at 559–51, 870–77.
325. *See id.* at 634–42, 683, 752–58.
326. *See id.* at 152, 493, 542–49, 605–06, 881–86.
327. *See supra* p. 538.
328. There were two propositions—Propositions 6 and 115—introduced establishing and outlining the authority of the legislative branch of government. *See* RECORDS, *supra* note 286, at 1034–44, 1284–92. In addition, the Committee on Legislative Department, Distribution of Powers and Apportionment, after examining Proposition 6, reported to the committee of the whole that it recommended a Substitute Proposition 6. *Id.* at 1044. Both versions of Proposition 6, as well as Proposition 115, contained a provision prohibiting the legislature from passing a special or local law limiting civil actions. *Id.* at 1041, 1049, 1291. This provision ultimately was adopted and became Article IV, Part 2, Section 19(6) of the Arizona Constitution. *Id.* at 910, 1407.
329. *See* 2 NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 40.01 (1986).

sion, a legislature has authority to enact statutes that change the common law of torts so long as these enactments have a reasonable purpose and do not arbitrarily or unreasonably discriminate in favor of an individual or class of individuals by granting a special or exclusive immunity or privilege.[330] If the classification adopted by the legislature extends the benefits or protection of the law to all those who are affected by the evil or situation sought to be eliminated or modified, the law does not run afoul of the "no special law" constitutional provision because it does not discriminate in favor of certain individuals while ignoring others who also should receive the benefit of the law.[331]

Another kind of constitutional provision that was quite common among the states assures the right of access to the courts.[332] This type of provision has been variously referred to as an "open court," "access-to-court," or "certainty-of-remedy" provision.[333] Although the exact language of this kind of constitutional provision varies, there is usually some reference to the right of individuals to a remedy in law for injuries sustained in their person, property, or reputation and to the requirement that the courts shall remain open to administer justice without sale, denial, or delay.[334] This type of "open court" provision was introduced at the Arizona Constitutional Convention,[335] but it was not included in the final version of the constitution.[336] The fact that it was proposed, however, does not appear to have had any affect on the final versions of Section 31 of Article II and

330. *See* Republic Investment Fund I v. Town of Surprise, 166 Ariz. 143, 148, 800 P.2d 1251, 1257; *see also* Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (holding that statute abolishing collateral source rule in medical malpractice cases is not a special law limiting civil actions and does not violate the "no special law" provision contained in ARIZ. CONST. art. IV, pt. 2, § 19(6)).

331. There is nothing in the record of the constitutional convention to indicate that anything other than the description given in the text was intended in adopting the "no special laws" provision. *See supra* note 328; *see also* 2 SINGER, *supra* note 329, §§ 40.01–40.29; 73 AM. JUR. 2D §§ 4–6 (1974). For a recent interpretation of the provision, see *Republic Investment Fund I*, 166 Ariz. at 148–49, 800 P.2d at 1257–58.

332. *See generally* Donald B. Brenner, *The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights?*, 13 RUTGERS L.J. 399 (1982).

333. For convenience, this type of provision establishing access to the courts and ensuring a remedy for legally recognized wrongs will be referred to hereinafter as an "open court" provision.

334. *See* Brenner, *supra* note 332, at n. 2. For a short history tracing the source of this type of provision back to the Magna Carta, see David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 1, 35 (1986).

335. This provision was included in two separate propositions, each of which outlined a bill of rights. Proposition 104, Section 2 provided: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property or reputation; and right and justice shall be administered without sale, denial, delay or prejudice." RECORDS, *supra* note 286, at 1251. A substantially similar version appeared as Section XXIV of Proposition 116. *Id.* at 1299.

In addition, Proposition 94, also detailing a bill of rights, contained a much more limited provision that merely said: "Section 10. Justice in all cases shall be administered openly, and without unnecessary delay." *Id.* at 1233. The Committee on Preamble and Declaration of Rights, after examining this proposition, recommended a Substitute Proposition 94, *id.* at 507, which also contained the identical language found in Section 10 of the original proposition. *See id.* at 1238. Substitute Proposition 94 was approved by the Constitutional Convention, *id.* at 1374, and Section 10 of that proposition became Section 11 of Article II, Declaration of Rights, of the Arizona Constitution. *See id.* at 1400.

336. Propositions 104 and 116, the two propositions that contained an "open court" provision, *see supra* note 335, were indefinitely postponed. RECORDS, *supra* note 286, at 1376, 1378.

Section 6 of Article XVIII.[337] Like the "no special law" provision, which was adopted,[338] an "open court" provision of the type described, even had it been adopted,[339] probably would not have been construed to place any specific or absolute restriction on the power of the legislature to make reasonable changes in the legal rights and remedies of injured people.[340] Thus, neither the fact that a "no special law" provision was introduced and adopted, nor the fact that an "open court" provision was introduced but not adopted need concern us any further in this inquiry.

The seven propositions upon which this article focuses all contained provisions directly affecting the rights and responsibilities of those who cause, and those who suffer, personal injuries from accidents. The provisions, as introduced, fall into only five basic categories because some of the propositions contained clauses that were substantially the same. However, it is important to trace the evolution of all seven because each proposition bears some relationship to the various clauses or sets of clauses pertaining to tort law that were adopted in the final version of the constitution in 1910. In fact, the convention process may be described as metamorphic as the original provisions pertaining to tort law were modified, rearranged, and transformed. Moreover, the process itself may speak louder for interpretative purposes than what was actually said about the propositions during the floor debate, especially since there was not an abundance of such debates.[341]

All seven of the original propositions containing tort law provisions were introduced at the constitutional convention almost within a week of each other during the latter part of October.[342] Sometimes the provisions were buried in propositions addressing much larger subjects; other times the proposition

337. There is nothing in the record of the convention proceedings or newspaper accounts that indicates the "open court" provisions described at *supra* note 335 were considered on the merits or that their introduction in anyway influenced any actions on other measures concerning tort law or the legislature's authority to modify it.

338. *See supra* note 328.

339. The Supreme Court of Arizona in recent years has characterized Section 6 of Article XVIII as a special type of "open court" provision. Although this may be the case, all the supporting facts indicate it was only intended to guarantee a cause of action in tort for employees who had sustained on-the-job injuries and was not intended to apply generally. *See infra* notes 647–98 and accompanying text.

340. In construing an "open court" provision under state constitutional law, the majority of courts have refused to hold that the legislature has absolutely no authority to abolish or modify tort rights recognized at common law, particularly where a reasonable alternative remedy is provided. *See* Note, *Developments in State Constitutional Law: 1990*, 22 RUTGERS L.J. 887, 1140–46 (1991); Note, *Developments in State Constitutional Law: 1989*, 21 RUTGERS L.J. 903, 934–37 (1990); Note, *Developments in State Constitutional Law: 1988*, 20 RUTGERS L.J. 903, 906–27 (1989); *see also* Patrick E. Sullivan, *Medical Malpractice Statute of Repose: A Constitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150, 170–78 (1983) (surveying and classifying the various decisional interpretations of "open court" provisions in state constitutions); Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202 (1964) (reviewing effect of "open court" provisions on legislative and judicial changes in tort law). For articles discussing individual states' treatment of their "open court" clauses, see Schuman, *supra* note 334; Ruth A. Mickelsen, *The Use and Interpretation of Article I, Section 8 of the Minnesota Constitution 1861–1984*, 10 WM. MITCHELL L. REV. 667 (1984); Judith Anne Bass, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U. L. REV. 871 (1977). For an article discussing attacks on statutes of repose under "open court" provisions, see Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981).

341. *See supra* note 326 and accompanying text.

342. *See infra* text accompanying notes 343, 361, 371, 393, 395, 433, 452.

contained only the tort law provision. Without exception, however, the provisions were concise and to the point, expressing clearly the author's objective. Each appears to have been introduced independently of the others and there is no sign that introduction of one may have been a catalyst for the introduction of any other. Each will be considered in the order that it was proposed.

A. Proposition 22: Abolition of Fellow-Servant Doctrine

The first proposition affecting tort law was introduced on the morning of October 18, 1910 by Albert C. Baker, Democratic delegate from Maricopa County and former Chief Justice of the Arizona Territorial Supreme Court.[343] Although Baker was not a member of the Committee on Private Corporations and Banks,[344] he introduced Proposition 22, a proposition that would regulate private corporations in some detail.[345] In this respect one part of the proposition would alter tort liability for some employers. True to the Democratic campaign platforms from counties with large labor contingents,[346] Section 13 of Proposition 22 abolished the fellow-servant doctrine, at least as it impacted railway companies and mines:

> The Common Law Doctrine of the Fellow Servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to every employee of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this State, and every such employee shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employe or employes of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a non-assignable duty.[347]

It is interesting that Baker chose a proposition designed to regulate private corporations as the vehicle to abolish the fellow-servant doctrine, particularly since the reach of Section 13 went beyond this form of business association in the case of mining. Unlike the clause referring to railroad and railway companies which appears to be limited to corporations, the clause referring to mining applies to "every person, firm, or corporation" engaged in mining. It is also interesting that Section 13 as proposed by Baker only applies to the railroads and the mines and the fellow-servant doctrine would still operate as a defense for employers in other industries.

Proposition 22 was not the only one aimed at regulating private corporations. Two more were introduced later that same day[348] and an additional two were introduced[349] before the deadline for introductions passed.[350] None of the

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343. RECORDS, *supra* note 286, at 1387.
344. *See id.* at 22.
345. *See id.* at 1104.
346. *See supra* text accompanying note 141.
347. RECORDS, *supra* note 286, at 1106–07.
348. *See id.* at 50, 1118–22 (setting forth Proposition 29, a "Proposition Relative to Private Corporation"); *id.* at 50, 1133–34 (setting forth Proposition 37, a "Proposition Relative to Corporations").
349. *See id.* at 86, 1256–59 (setting forth Proposition 105, a "Proposition Relative to Corporations"); *id.* at 96, 1301–07 (setting forth Proposition 118, a "Proposition Relative to Corporations, Banking and Currency").
350. The deadline for introducing propositions was October 31, 1910. *Id.* at 53.

last four mentioned, however, contained any reference to the fellow-servant doctrine or any other matter pertaining to tort rights or responsibilities.

After the second reading of Proposition 22, it was referred to the Committee on Private Corporations and Banks[351] which, after examining it, reported on November 18, 1910 that it was recommending an alternative to be denominated Substitute Proposition 22.[352] The substitute proposition contained language identical to that in Section 13 of the original,[353] but the Section was renumbered as Section 14.[354] Substitute Proposition 22 was approved by the convention,[355] and all the other propositions aimed at regulating private corporations were indefinitely postponed.[356] However, the language found in Section 14 abolishing the fellow-servant doctrine[357] was not approved as part of Substitute Proposition 22[358] and did not become part of Article XIV, the article of the Arizona Constitution that governs private corporations.[359] As will be explained below, an expanded version of Section 14 dealing with the fellow-servant doctrine was adopted as Section 4 of Article XVIII, the article containing the labor provisions.[360]

B. Proposition 47: Abolition of Employee Agreements to Waive Tort Damages

Proposition 47 concerned employment contracts and was introduced by Andrew F. Parsons on the morning of October 19.[361] Parsons was an attorney and a Democratic delegate from Cochise County.[362] He chaired the Committee on Federal Relations and also served as a member of the Committee on Judiciary and Committee on Public Service Corporations other than Railroads.[363] Proposition 47 was aimed at the commonly imposed requirement that employees must waive their tort rights as a condition of employment. It provided:

> That it shall be unlawful for any person, company, association or corporation, to require of its servants or employes as a condition of their employment, or otherwise, any contract or agreement, whereby such person, company, association or corporation shall be released or discharged from liability or responsibility, on account of personal injuries received by such servants or employes, while in the service or employ of such person, company, association or corporation, by reason of the negligence of such person, company, association or corporation, or the agents or employes thereof, and such contracts, if made, shall be absolutely null and void.[364]

This proposition, which would eliminate express assumption of risk[365] as a defense to employee claims for personal injury or death, was referred in turn to

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351. *See id.* at 73.
352. *See id.* at 434.
353. *See supra* text accompanying note 347.
354. *See* RECORDS, *supra* note 286, at 1111.
355. *See id.* at 840–43.
356. See *id.* at 1358–86 for Index to Disposition of Propositions.
357. *See supra* text accompanying note 347.
358. *See* RECORDS, *supra* note 286, at 864.
359. *See id.* at 1428.
360. *See infra* text accompanying notes 521–23.
361. *See* RECORDS, *supra* note 286, at 53.
362. *Id.* at 1395.
363. *See id.* at 21–22.
364. *Id.* at 1145.
365. If consent to assume the risk is not just a matter of express agreement, but also may be implied from the conduct of the employee, Proposition 47 arguably would not have

several different committees at the convention.[366] As will be seen below, the substance of Proposition 47 was duplicated in the second sentence of Proposition 50.[367] Both propositions were opposed by a majority of the Judiciary Committee,[368] but eventually the language of Proposition 47, with only a few minor changes, was adopted by the convention[369] and was incorporated as Section 3 of Article XVIII on labor.[370]

C. Propositions 6, 50, and 115: Restriction on Legislative Power to Limit Tort Damages

Delegate Parsons also introduced Proposition 50 on the morning of October 19[371] and after the second reading it was referred to the Committee on Judiciary.[372] It provided:

> That no law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void.[373]

The second sentence of this proposition merely repeated, albeit in a more succinct form, what was already contained in Proposition 47 regarding waiver of rights to collect damages from employers as a condition of employment. The first sentence of Proposition 50, however, appeared to be broader. As written, it was not limited to employment situations, but proposed a more general restriction on the power of the legislature to limit the amount of damages in tort actions arising from personal injury or death. However, this *prima facie* reading apparently was not the understanding of either the sponsor or some of the other delegates.

On November 1, 1910, Donnell L. Cunningham, as Chairman of the Judiciary Committee, reported to the committee of the whole that Proposition 50 had been examined and that the Judiciary Committee recommended that it be adopted.[374] After an amendment containing a change in style was made to the second sentence,[375] a motion was adopted by the committee of the whole that it recommend to the convention that Proposition 50 be adopted as amended.[376] When the matter came before the convention, Alfred M. Franklin and his

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completely voided assumption of risk as a defense. It would have outlawed express agreements by employees to assume the risk of injury but not necessarily assumption of risk in the implied form. *See* W. PAGE KEETON ET AL., *supra* note 201, § 68, at 480–86.

366. Proposition 47 was referred to the Committee on Labor after the second reading on October 25, *see* RECORDS, *supra* note 286, at 83, but three days later referred from the Labor Committee to the Committee on Legislative Department, Distribution of Powers and Apportionment. *See id.* at 104. On November 1, the latter committee recommended that it be referred to the Judiciary Committee. *See id.* at 137.

367. *See infra* text accompanying note 373.

368. *See* RECORDS, *supra* note 286, at 492–93.

369. Upon a "do pass" recommendation by a minority of the Judiciary Committee, the convention approved Proposition 47. *See id.* at 550, 555, 848.

370. *See id.* at 1435.

371. *See id.* at 53.

372. *See id.* at 83.

373. *Id.* at 1147.

374. *See id.* at 145, 150.

375. The words "made by" were substituted for the word "with" and the words "to waive" were substituted for the word "waiving," *id.* at 150, so that the sentence would read: Any contract or agreement *made by* any employee *to waive* any right to recover damages for causing the death or injury of any employee shall be void.

376. *See id.*

colleague Albert Baker, both lawyers and Democratic delegates from Maricopa County, questioned the wisdom of limiting the proposition to employment situations.[377] Although there was nothing in the first sentence of Proposition 50 to indicate that it applied only to employment situations, apparently it was their understanding that this sentence only served as a prohibition on the power of the legislature to limit damages in suits by employees against their employers. This understanding is revealed in the excerpts from the transcript of the convention proceedings set out below:

> Mr. Franklin: I would like to understand this matter more thoroughly. I understand that this Proposition Number 50 does not allow any limitations to amounts that can be required [sic, recovered] by employees for damages by death or injury and that no contract can be made by any employer to prevent the employee from securing damages for death or injury. I think that this measure should be made not only to include employees but other persons, as in the case of a railroad accident. Should not other persons as well as employees be protected? I would like a little advice on the matter.
>
> Mr. Baker: The question as to no limitation to the amount that employees can sue for in case of death or injury is very clear to my mind, but I would like to know why everyone, whether an employee or not, should not be protected in the matter of accident, death or injury? I would not only favor the measure as a protection to employees but I would make it to cover all persons who may be included in an accident,—where such persons were subjected to accident, death or injury, as in a railroad accident.[378]

At that point, Samuel L. Kingan, a lawyer and Republican delegate from Pima County, moved to strike the references to employees in the second sentence[379] so that Proposition 50 would read: "That no law shall be enacted in this State limiting the amount of damages to be recovered for causing the death or injury of any person. Any contract or agreement to waive any right to recover damages for death or injury shall be void."[380] Apparently, by removing any reference to employment situations in the second sentence, this one amendment was designed to make both sentences of the proposition apply to all cases of personal injury or death as urged by Mr. Baker. Yet, Baker was still concerned about something that prompted him to make further inquiry.

Mr. Baker asked the sponsor, Andrew Parsons, "from what state constitution, if any, he [Parsons] took the proposition."[381] Parsons replied that it was taken verbatim from the Wyoming Constitution,[382] but his response did not reveal all that was necessary for a complete understanding as to how the language of Proposition 50 apparently was being employed by the Judiciary Committee. Even though the original language of Proposition 50[383] was identical

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377. *See id.* at 152.
378. *Id.*
379. *Id.*
380. Although the text of Proposition 50 is not set out in the proceedings, this would be the phrasing based on Kingan's motion to strike the words "made by any employee," "causing the," and "of any employee" in the second sentence as amended by the stylistic changes made moments earlier. *See supra* note 375.
381. RECORDS, *supra* note 286, at 152.
382. *Id.*
383. *See supra* note 373 and accompanying text.

to that in the Wyoming Constitution at the time,[384] what Parsons did not say was that the language was taken from an article in the Wyoming Constitution that dealt only with corporations.[385] As a part of the Wyoming article on corporations it was clear that both sentences were limited to situations where an action for personal injury or death could be brought against a corporation. That this was the understanding of the Judiciary Committee was made clear by its Chairman, Donnell L. Cunningham, also a lawyer, when he also responded to Baker's question:

> We understood that this was a measure which considered only the causes where employer and employee were concerned and for this reason we did not take any steps to amend it to include others, as we took it that the original proposition was intended to cover only those who were employees of certain corporations, as the case might be.[386]

Taken out of the particular context of the Wyoming Constitution, however, the first sentence of Proposition 50 as introduced[387] would appear to be a general prohibition on the legislature. As far as the second sentence is concerned, it is problematic, whether viewed in or out of context. When viewed in the context of the Wyoming article on corporations, it does not clearly state that it is aimed at certain corporate employers who were requiring employees, as a condition of employment, to execute a waiver that not only released the corporation from any exposure to tort liability for having caused personal injury or death to the employee but also released the employer from any responsibility whatsoever. For example, it does not distinguish the situation where an employer might give an employee the option of retaining common law tort rights or foregoing those rights in favor of some type of accident benefit plan. When taken out of context, in addition to being problematic in accomplishing its purpose in abolishing the practice of employers requiring employees to sign waivers for personal injury or death, it appears to have no limit at all as to the type of employer to whom it would apply. It would apply to any employer, regardless of the occupation or form of ownership.

Nonetheless, the concerns that were raised by Baker and Franklin were apparently eliminated by Kingan's motion to remove the language referring to employees in the second sentence of Proposition 50, as it was quickly adopted by the convention.[388] At the very least, Baker seemed to understand that Proposition 50, as amended by Kingan's motion, now applied to all cases because immediately after the vote he was recorded as having said: "I confess on the spur of the moment that I am in doubt as to whether you can limit all contracts or not."[389]

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384. Article X [Corporations], Section 4 of the Wyoming Constitution provided: "No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person. Any contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void." WYO. CONST. art. X, § 4 (1889).

This provision was made a part of the Wyoming Constitution in 1890 when it was admitted as a state. *See* Mestas v. Diamond Coal & Coke Co., 76 P. 567, 568 (Wyo. 1904).

385. For a copy of the Wyoming Constitution that was in effect in 1910, see 1910 WYO. COMP. STAT. ANN. 74 (Mullen 1917).

386. RECORDS, *supra* note 286, at 152.

387. *See supra* text accompanying note 373.

388. *See* RECORDS, *supra* note 286, at 152.

389. *Id.* Apparently, Baker was referring to the holding in Lochner v. New York, 198 U.S. 45 (1905), where the United States Supreme Court, in a five to four decision, held a New York statute limiting the hours a baker could work as unconstitutionally violating the rights of

Whether or not the next action on Proposition 50 was motivated by Baker's comment is not clear, but it was referred back to the Judiciary Committee[390] instead of being recommended for adoption at that time by the convention.

Three weeks would pass before the Judiciary Committee would again report on Proposition 50. In the meantime, the Committee on Legislative Department, Distribution of Powers and Apportionment had under consideration Propositions 6[391] and 115.[392] The former was introduced on October 17 by Lysander Cassidy,[393] a lawyer and Democrat from Maricopa County.[394] The latter was introduced on October 27 by Samuel Kingan,[395] the Pima County Republican who had successfully moved to expand Proposition 50 beyond employment situations.[396] Both Propositions 6 and 115 provided for the constitutional powers and limitations of the legislative branch in some detail, but there was an interesting difference between the two. Kingan's proposal contained a restriction on the authority of the legislature to limit damages in personal injury and death cases, whereas Cassidy's was silent on the subject. This restriction, which was contained in Section 27 of Proposition 115, was very similar to the language contained in the first sentence of Proposition 50. Section 27 provided: "The Assembly shall not pass any law or laws limiting the amount of liability for personal injuries or injuries resulting in death."[397]

Thus, it would appear that Kingan's motion to amend Proposition 50 so that it would not be limited to employment situations was no spur of the moment reaction to the questions posed by Franklin and Baker.[398] He had already introduced a proposition that would prohibit the legislature from passing a statute that would limit damages for personal injury or death in any case. Although Proposition 115 was never adopted,[399] at the very least Kingan was consistent.

When the Committee on Legislative Department, Distribution of Powers and Apportionment reported on Proposition 6 on November 18 it recommended a substitute version.[400] However, Substitute Proposition 6, unlike the original, contained a new Section 19 which prohibited the legislature from passing any law limiting the amount of liability for personal injuries or death.[401] The only difference between the new section of Substitute Proposition 6 and Section 27 of Proposition 115 was that the latter referred to the "Assembly," the term used to

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an employer and employee to enter a labor contract, an argument he also made in subsequent debates regarding Proposition 50 on the convention floor. *See infra* note 412 and accompanying text.

390. *See* RECORDS, *supra* note 286, at 152.
391. *See id.* at 1034.
392. *See id.* at 1284.
393. *See id.* at 44.
394. *See id.* at 1387.
395. *See id.* at 93.
396. *See supra* text accompanying notes 379, 388.
397. RECORDS, *supra* note 286, at 1289.
398. *See supra* text accompanying notes 377–78.
399. Proposition 115 received a second reading on October 31, 1910 and was referred to the Committee on Legislative Department, Distribution of Powers and Apportionment. *See* RECORDS, *supra* note 286, at 134. The Committee reported to the committee of the whole on November 18 that it recommended Proposition 115 be indefinitely postponed. *See id.* at 437. The committee of the whole approved the recommendation on November 23, 1910 and the convention concurred on the same afternoon. *See id.* at 597, 606.
400. *See* RECORDS, *supra* note 286, at 435.
401. *Id.* at 1048.

describe the legislature of the Arizona Territory, whereas Section 19 of Substitute Proposition 6 referred to the "Legislature." Given the similarities of the two versions, it is very likely that the Committee on Legislative Department, Distribution of Powers and Apportionment took the language in Section 19 of Substitute Proposition 6 from Section 27 of Proposition 115 as introduced by Kingan, even though the convention had amended Proposition 50 on Kingan's motion to say the same thing just two and one-half weeks earlier.[402]

It is not clear, though, why the Committee on Legislative Department, Distribution of Powers and Apportionment continued to include the provision limiting the legislature's power in Substitute Proposition 6. Perhaps it was because Proposition 50 had been referred back to the Judiciary Committee[403] and there was some concern over what the Judiciary Committee would recommend when it reported back to the committee of the whole. On the other hand, it was clear by November 18 that Substitute Proposition 6 was the vehicle that would be used to establish the overall constitutional authority of the legislature. Every other proposition detailing the constitutional power of the legislative branch that was read on November 18 came with a committee recommendation that it be postponed indefinitely.[404] In the case of some propositions it was ruled that the particular proposition would be considered at the same time Substitute Proposition 6 was taken up in the committee of the whole; in the case of others it was merely a matter of no action being taken at that time.[405] Thus, it may have been that until Proposition 50 was addressed again by the committee of the whole,[406] the Legislative Committee, or at least Samuel Kingan, felt that the same provision should continue to be included in Substitute Proposition 6. However, it may have been merely a question of where the provision should be placed in the constitution and the committee may have felt that any restriction on the power of the legislature logically should go in the article of the constitution setting out the powers and responsibilities of the legislature.

In any event, on November 21, 1910 the Judiciary Committee again reported on Proposition 50 to the convention.[407] The committee appeared to be in agreement that the first sentence of Proposition 50 should restrict the power of the legislature to limit tort damages for personal injury or death in any case, but there was disagreement on the second sentence, the sentence that would outlaw all contracts or agreements to waive the right to recovery damages for personal injuries or death. Seven members of the Judiciary Committee, including the chairman, recommended that Proposition 50 be further amended by striking the second sentence altogether, whereas two members recommended that the second sentence, which had previously been amended to delete any reference to

402. *See supra* text accompanying notes 379, 388.
403. *See supra* text accompanying note 390.
404. *See* RECORDS, *supra* note 286, at 436–37. Proposition 43, which established the fundamental division of power between the legislative, executive, and judicial branches of government, was recommended for approval by the Committee on Legislative Department, Distribution of Powers and Apportionment on November 18. It eventually was adopted, as amended, as Article III of the Arizona Constitution. *See* RECORDS, *supra* note 286, at 1365.
405. *See id.* at 437.
406. *See infra* text accompanying notes 407–13.
407. *See* RECORDS, *supra* note 286, at 493.

employment situations,[408] be adopted.[409] Among the seven member majority were Andrew Parsons, the original sponsor of Proposition 50,[410] and Alfred Franklin and Albert Baker, both of whom were interested in making sure that the first sentence applied generally and not just to damage claims by employees against their employers.[411] The majority argued that the second sentence, as amended, "would limit the rights of contract and deny to persons injured the equal protection of the law and therefore be in conflict with the Constitution of the United States and take away the liberty of the people if valid."[412] No action was taken on Proposition 50 that day other than to refer it to the committee of the whole which would consider it the next day.[413]

On the afternoon of the next day, November 22, the convention reconvened and resolved into a committee of the whole.[414] After considering some other matters that had carried over from the morning session, the committee of the whole turned its attention to the propositions dealing with tort law. However, the first item was not Proposition 50 or any of the others discussed above, but Proposition 88, the proposition that outlined an employers' liability act.[415] Time was running short as the convention approached its December 10 adjournment deadline and the process had reached the point where the various propositions dealing with tort law needed to be reconciled and integrated. At this point, the fate of Proposition 50 became intertwined with that of Proposition 88 because the latter contained, among others, two sections that substantially duplicated the subject matter covered in Proposition 50. Section 3 of Proposition 88 outlawed contractual waivers by employees to recover damages for personal injury or death against employers,[416] which was covered in the second sentence of Proposition 50, as amended,[417] and Section 5 prohibited any statutory limitation on the amount recoverable by employees for those damages,[418] which was covered in the first sentence of Proposition 50.[419] The restrictions in Proposition 88, however, were limited to employment situations whereas those in Proposition 50 applied to all injury and death situations.

As was the case the preceding day, there was no debate over the provision in Proposition 88 dealing with the restriction on the legislature's power to limit damages.[420] Both the majority and minority factions of the Judiciary Committee seemed to agree that a constitutional provision of some type prohibiting the legislature from being able to limit damages in personal injury and death cases

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408. *See supra* text accompanying notes 379, 388.
409. *See* RECORDS, *supra* note 286, at 493. There is nothing in the records of the convention to indicate the position of the remaining four members of the committee.
410. *See supra* text accompanying note 371.
411. *See supra* text accompanying notes 377–78.
412. RECORDS, *supra* note 286, at 493. This argument was obviously based on the reasoning of the majority opinion in Lochner v. New York, 198 U.S. 45 (1905). *See supra* note 389.
413. *See* RECORDS, *supra* note 286, at 493.
414. *See id.* at 538–39.
415. *See id.* at 542.
416. *See id.* at 1228.
417. There is no record of the wording of the second sentence of Proposition 50 after it was amended, but the amendment simply struck any reference to employment contracts. *See supra* note 380 and accompanying text.
418. *See* RECORDS, *supra* note 286, at 1228.
419. *See supra* text accompanying note 373.
420. *See* RECORDS, *supra* note 286, at 542–48.

was needed. It was the other provision outlawing contractual waivers of damages that stirred debate.[421] Suffice it to say that at this juncture, the minority position on the Judiciary Committee prevailed and Proposition 50, with both sentences intact, was approved by the committee of the whole.[422] Insofar as the relation between the two sentences in Proposition 50 and Sections 3 and 5 of Proposition 88 is concerned, this will be explored in more detail below[423] when Proposition 88 is considered in its entirety. It is more appropriate to proceed in this manner because the consideration of Proposition 88 also served to focus attention on the need to reconcile and integrate other propositions and one needs to see the relationship between those propositions to Proposition 88 as well as the relation of Proposition 50 to Proposition 88.

It is interesting that there was no discussion or debate about the first sentence of Proposition 50 dealing with the power of the legislature to limit damages during the proceedings of the committee of the whole or the convention on the afternoon of November 22. In addition, the fact that Section 19 of Substitute Proposition 6[424] also contained an almost identical provision as that in the first sentence of Proposition 50 restricting the power of the legislature to limit common law damages in personal injury or death cases went unmentioned. Not only was there no mention of Section 19 when Proposition 50 was approved by the committee of the whole, there likewise was no mention of Proposition 50 when Substitute Proposition 6 was considered by the committee of the whole one day later.

The committee of the whole took up Substitute Proposition 6 as its first item of business on the morning of November 23, 1910[425] and proceeded to consider it section by section.[426] Section 19, with its duplicative language, was reached and approved by the committee of the whole on the afternoon of November 23 without comment.[427] The committee of the whole gave the proposition a "do pass" recommendation when the committee next reported to the convention.[428] The convention accepted the report of the committee of the whole and voted to approve Substitute Proposition 6, with Section 19 still intact, the same afternoon.[429] However, on November 30, one week later and just before the Committee on Style, Revision and Compilation reported Substitute Proposition 6 for final reading and adoption by the convention, a question was raised that indicated Section 19 had been removed.[430] In response to a query concerning the fate of Section 19, Michael Cunniff, the Chairman of the Style Committee, explained that the Committee felt that this section should be incorpo-

421. *See id.* at 547–48.

422. When the committee of the whole reached Section 3 of Proposition 88, a motion was made to substitute Proposition 50 for Sections 3 and 5 of Proposition 88, but the chair of the committee of the whole ruled that it should be passed on independently of Proposition 88. *See id.* at 547. The committee of the whole then proceeded to approve Proposition 50. *See id.* at 548. Shortly thereafter the chair ruled that the two sentences of Proposition 50 had been substituted for Sections 3 and 5 of Proposition 88. *See id.* at 549; *infra* text accompanying notes 503–05.

423. *See infra* text accompanying notes 492–512, 524–27, 562–70, 576–84.

424. *See supra* text accompanying note 401.

425. *See* RECORDS, *supra* note 286, at 572.

426. *See id.* at 572–96.

427. *See id.* at 592.

428. *See id.* at 596–97.

429. *See id.* at 606.

430. *See id.* at 795.

rated elsewhere in the constitution along with the fellow-servant and employers' liability provisions.[431] After this exchange, Substitute Proposition 6 was passed,[432] apparently without Section 19 being a part of it. There is no record of any further consideration of Section 19, at least by number, during the convention.

D. Proposition 72: Establishment of Workers' Compensation System

On October 21 true to his campaign promise,[433] E.E. Ellinwood, the Democratic delegate and corporate lawyer from Cochise County, proposed that the constitutional convention embrace a compulsory workers' compensation system.[434] This proposal was contained in Proposition 72 which provided that:

> Section 1. The Legislature shall enact a compulsory workmen's compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, and by which compulsory compensation shall be paid to such workmen by their employers, if in the course of such employment personal injury by accident, arising out of, and in the course of the employment is caused to any such workman employed therein, in whole, or in part, or the damage or injury caused thereby is in whole or part contributed to by a necessary risk or danger of the employment, or one inherent in the nature thereof; or failure of the employer of such workman or any of his or its officers, agents or employees to exercise due care, or to comply with any law affecting such employment.[435]

Ellinwood's proposal was unique in at least two respects. First, it was not made part of any of the platforms adopted at the county conventions.[436] Those platforms that did speak to the plight of workmen regarding on-the-job injuries advocated the adoption of an employers' liability act,[437] sometimes specifically suggesting the federal legislation on the subject as a model.[438] Ellinwood argued during the campaign that the employer liability legislation had proved inadequate and that a more radical change was needed.[439] His suggestion was to replace the tort system for work-place injuries with a compulsory insurance system. The fact that he appeared to be alone in doing so did not daunt him.

Ellinwood's proposal also was unique in a broader sense. At the time he proposed that Arizona adopt a workers' compensation system, only one other state had done so. New York had passed such a statute only a few months before Proposition 72 was introduced,[440] and Ellinwood announced on the convention

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431. *See id.* at 795–96.
432. *See id.* at 800. Substitute Proposition 6 became Article XIV of the Arizona Constitution.
433. *See supra* text accompanying note 226.
434. *See* RECORDS, *supra* note 286, at 65–66.
435. *Id.* at 1181.
436. *See supra* text accompanying notes 199–202.
437. *See id.*
438. *See supra* text accompanying note 201.
439. *See supra* text accompanying note 226.
440. Law of May 24, 1910, ch. 352, 1910 N.Y. Laws 625; Law of June 25, 1910, ch. 674, 1910 N.Y. Laws 216. Although this legislation was declared unconstitutional the next year on the ground that the imposition of liability without fault on the employer constituted a deprivation of property without due process of law under the New York Constitution, *see* Ives v. S. Buffalo Ry., 94 N.E. 431 (N.Y. 1911), the New York Constitution was amended in 1913 and another compensation act was enacted under the authority of the amendment. Law of Mar.

floor that the New York statute had served as a model for his proposal.[441] Thus, the fact that Arizona was even considering Ellinwood's proposal put it in the forefront of an extraordinary movement.[442] Yet, novel as the concept may have been, it provoked almost no discussion as it was being considered in the committee of the whole. Aside from Ellinwood's support for Proposition 72, there was only one other delegate who even commented on it at the time.[443]

When Proposition 72 came up for final adoption by the convention on December 5, 1910, Proposition 88 providing for an employers' liability act had just been approved by the convention.[444] At this point a motion was made by Patrick F. Connelly, a railroad engineer and Democratic delegate from Cochise County, to make it clear in the constitution that an injured employee would in fact have the option to elect the compensation benefits to be provided by statute under the authority of Proposition 72 or to sue in tort under the employers' liability act.[445] After this motion passed, Michael Cunniff, chair of the Committee on Style, Revision and Compilation, commented that "Proposition Number 72 does not seem to be very favorable or very important and since it is along the line of Proposition Number [88],[446] but does not contain all the elements, I think it is unnecessary."[447] A motion then was made to postpone Proposition 72 indefinitely, but it lost as Ellinwood strongly opposed the motion.[448] The convention then proceeded to adopt Proposition 72 by a vote of thirty-nine to nine.[449] Ultimately it became Section 8 of Article XVIII, the labor article in the Arizona Constitution.[450]

E. Proposition 88: Employers' Liability

Although more political platforms of successful candidates had proposed an employers' liability act than any other tort reform, employers' liability was the last measure affecting tort law to be introduced. On October 24, Michael Cunniff, the Harvard educated former editor of the *The World's Work*,[451] intro-

16, 1914, ch. 41, 1914 N.Y. Laws 216 (originally enacted as Law of Dec. 16, 1913, ch. 816, 1913 N.Y. Laws (unpublished)).

441. *See* RECORDS, *supra* note 286, at 549.

442. *See supra* note 259 and accompanying text.

443. On November 22, when the Committee on Labor reported a "do pass" recommendation to the committee of the whole, it was then that Ellinwood pointed out in his argument in favor of Proposition 72 that it had been modeled after the recent New York law. *See* RECORDS, *supra* note 286, at 549. E.L. Short, a Democratic Delegate from Yuma, commented "I do not care whether this is taken from the State of New York, or the state of matrimony," *id.*, and went on to assert that it conflicted with Proposition 50. *Id.* Short also seemed to be opposed to Proposition 72 because it was binding on the employer to pay compensation benefits whereas the employee was given the option either to accept the benefits or to pursue a tort remedy. *Id.* Despite these objections, the committee of the whole recommended to the convention that Proposition 72 be adopted. *Id.*

444. *See* RECORDS, *supra* note 286, at 885.

445. *See id.*

446. In the transcript of the constitutional convention, Cunniff is quoted as referring to "Proposition Number 82." *Id.* at 886. However, this is either an error in transcription or Cunniff misspoke because Proposition 82 dealt only with the judicial branch and said nothing about tort liability. *See id.* at 1195–1221. He clearly was referring to Proposition Number 88 and not to Proposition 82.

447. RECORDS, *supra* note 286, at 886.

448. *See id.*

449. *See Id.*

450. *See id.* at 981, 1435.

451. *See id.* at 1389.

duced Proposition 88.[452] It contained the following provisions relating to tort liability of an employer:

> Section 1. The Legislature shall enact, to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad or street railway transportation or any other industry, an employer's liability law, or employer's liability laws, which shall make any employer, whether individual, association, or corporation, liable for the death or injury by any accident due to a condition or conditions of such occupation of any employee in the service of such employer in such a hazardous occupation in all cases in which the death or injury of such employee by accident due to a condition or conditions of such industry shall not have been caused wholly by the negligence of the employee killed or injured.
>
> Section 2. No law shall be enacted and no rule of law shall be recognized in the State of Arizona whereby the defense of "fellow servant" or the defense of "assumption of risk" shall be recognized in actions to recover damages in cases of injury or death covered in the first section of this article; and any defense of "contributory negligence" permitted by statute or by any court in such cases shall be matter of determination by a jury, who shall decide to what extent damages shall be allowed in proportion to any degree of negligence, less than complete and wilful negligence, provided that whenever any defense of contributory negligence shall be set up, the presumption shall be that there has been no contributory negligence on the part of the individual killed or injured, and the burden of proof of the asserted contributory negligence shall be upon the defendant.
>
> Section 3. No waiver by contract of right to recover damages under this Article shall be valid.
>
> Section 4. Nothing in this article shall be construed as forbidding the law-making power to enact a law or laws establishing a system of compulsory compensation for injury or death of employees in hazardous occupations provided that such law does not abrogate any of the provisions of the employer's liability law or laws described in this Article, or any rights under said provisions.
>
> Section 5. There shall be no statutory limitation of the amount recoverable as damages in such cases of death or injury by accident as are described in Section 1 of this Article.[453]

In several respects, Proposition 88 duplicated measures that had already been introduced, but in other respects it proposed a new system for determining who and how much would be paid by employers for many on-the-job accidents. Under Section 1 the legislature would be required to enact a statute imposing liability on all employers for injury to or death of an employee caused by a condition or conditions arising from a "hazardous occupation" unless the injury or death was caused "wholly" by the negligence of the employee. There was no requirement that the employer be at fault. Under Section 2 the defenses under the fellow-servant doctrine and assumption of risk were to be abolished. Also contributory negligence of the employee would no longer result in a complete bar to recovery, but would only serve to reduce the damages otherwise awardable for the injury or death. Unlike Proposition 72,[454] which contemplated a system of reduced compensation in exchange for imposing broader liability upon the

452. *See id.* at 72–73.
453. *Id.* at 1227–28.
454. *See supra* text accompanying note 435.

employer, Proposition 88 would continue to hold the employer liable for a full measure of tort damages, subject only to being reduced where the employee was guilty of contributory negligence. In short, the employers in hazardous occupations would be liable for tort damages in all on-the-job accidents where the injury or death arose from a condition inherent in such work unless the employee's negligence was the sole cause of the accident.

Even though Proposition 88 duplicated other propositions regarding employer liability, it was a more coherent attempt to change tort law. For example, it complemented Proposition 72[455] by acknowledging in Section 4 that a workers' compensation system could be enacted by the legislature, but not to the exclusion of the rights granted to employees under the employers' liability provisions.[456] Thus, although Proposition 88 provided in Section 3 that an employee could not be required to waive his common law tort rights as a condition of employment,[457] a requirement that was also outlawed by Proposition 50,[458] Section 4 implicitly recognized the employee's right to elect to receive the benefits provided under a workers' compensation system in lieu of pursuing a tort action under the employers' liability law.[459]

Finally, Section 5 of Proposition 88 also duplicated to some extent the first sentence of Proposition 50, at least in so far as the latter was understood when introduced.[460] Both provisions prohibited the legislature from enacting a statutory limitation on the amount of damages recoverable for personal injury or death, but the original version of Proposition 50 was understood to apply only where employees were suing their corporate employers.[461] In contrast, Proposition 88, as introduced and although applying to all types of employers, corporate or not, was limited to personal injury or death due to conditions in hazardous occupations.[462] Although both dealt with employment situations, they were limited in different respects. However, at the time Proposition 88 was taken up on the convention floor, Proposition 50 had been amended to prohibit the legislature from imposing a limit on the right to recover damages in all personal injury or death actions, not just employment situations.[463] The interrelation of these two provisions —Proposition 50, as amended, and Section 5 of Proposition 88—and what happened to each at the convention is crucial to an understanding of how and why the Arizona Constitution ended up with two separate provisions dealing with the separation of powers between the judiciary and legislature regarding tort law. Yet, because other propositions already covered some of the same subjects contained in Proposition 88, the latter proposition came very near to elimination.

After Proposition 88 was introduced, it was referred to the Judiciary Committee[464] which rendered its report to the convention on November 21, 1910.[465] A majority of the Committee recommended that the following enabling language be substituted for the substantive provisions in the original proposi-

455. *See id.*
456. *See supra* text accompanying note 453.
457. *See id.*
458. *See supra* text accompanying notes 371–80.
459. *See supra* text accompanying note 453.
460. *See supra* text accompanying notes 373–86.
461. *See id.*
462. *See supra* text accompanying note 453.
463. *See supra* text accompanying notes 377–80.
464. *See* RECORDS, *supra* note 286, at 89.
465. *See id.* at 491.

tion:[466] "The legislature or the people shall enact an equitable and sufficient employer's liability law or laws for the protection and safety of employees in all hazardous occupations."[467]

The majority, all of whom were lawyers,[468] noted that Sections 3, 4, and 5 of Proposition 88 as introduced were already covered by other propositions[469] and with the proffered substitute language there would be no need for the remaining two sections, that is Sections 1 and 2.[470] The majority was content to leave it to the legislature to enact the specifics. A minority of the Judiciary Committee, none of whom were lawyers,[471] agreed that Sections 3 and 5 were already covered by Proposition 50, as amended, and that Section 4 was covered by Proposition 72, but recommended that Sections 1 and 2 be made a part of the constitution.[472] Apparently, they were not content to leave the matter to the legislature. Both reports were referred to the committee of the whole which would meet the next day, November 22.[473]

By the third week in November, the convention had acted, at least preliminarily, on all of the propositions that in some manner would directly affect tort rights and responsibilities in the new state if adopted. Yet, there remained some disagreement over substance and there were a number of provisions that had thus far been approved that contained duplicative, if not conflicting, language. There was still work to be done to resolve differences on the merits and to reconcile and integrate the various provisions in a more coherent approach to what ultimately would become part of the constitution. The next Section traces out the actions of the delegates in the final weeks of the convention as they proceeded to mold the various provisions discussed above relating to tort law into Section 31 of Article II and Section 6 of Article XVIII of the Arizona Constitution.

F. Reconciling and Integrating the Propositions Affecting Tort Law

The time was now close when decisions would have to be made on the several propositions dealing with tort reform. It is interesting to note that the Judiciary Committee was called to report to the convention on three of the seven propositions that are being examined in this Article on the morning of November 21. It first reported on Proposition 88[474] and immediately thereafter reported on Propositions 47 and 50.[475] In its report on Proposition 88, a majority of the committee reiterated its recommendation that Section 3 outlawing employee's contractual waivers of damages for personal injury or death be deleted because the matter was covered in other propositions.[476] The other propositions to which reference was made undoubtedly were Propositions 47 and 50 as these were the

466. *See supra* text accompanying note 453.
467. RECORDS, *supra* note 286, at 491.
468. Those representing the majority of the Judiciary Committee were, in addition to the Chairman D.L. Cunningham, E.E. Ellinwood, Andrew F. Parsons, Jacob Weinberger, Fred L. Ingraham, Albert C. Baker, and Alfred Franklin. RECORDS, *supra* note 286, at 491.
469. *See supra* text accompanying notes 453–63.
470. *See* RECORDS, *supra* note 286, at 491.
471. Those representing the minority were James E. Crutchfield, Homer R. Wood, and Morris Goldwater. *Id.*
472. *See* RECORDS, *supra* note 286, at 491.
473. *Id.* at 492.
474. *Id.* at 491.
475. *Id.* at 492–93.
476. *Id.* at 491.

two that contained provisions outlawing contractual waivers of tort rights.[477] Yet, moments later a majority of the Judiciary Committee[478] also recommended action on the latter two propositions that would ensure that the matter of contractual waivers was not addressed at all in the constitution. They recommended that Proposition 47 be indefinitely postponed and that Proposition 50 be amended to delete the sentence outlawing contractual waivers of damages for personal injury or death.[479] However disingenuous this majority's recommendation as to Section 3 of Proposition 88 would appear to have been, it may have played a part in narrowing the application of the constitutional provision outlawing contractual waivers of damages for personal injury or death that was finally adopted.[480] In any event, the various motions described above concerning Propositions 47, 50, and 88 were not acted upon on November 21.

On the afternoon of November 22 Proposition 88 again was taken up by the committee of the whole to decide what it should finally recommend to the convention regarding an employers' liability law.[481] The positions stated in the majority and minority reports regarding Proposition 88 were repeated.[482] The majority recommended that the constitution only contain a provision directing that the legislature enact an employers' liability law, the details of which would be left to that body.[483] The minority recommended that the details of the employers' liability law be embodied in the constitution,[484] rather than leaving such matters to the legislature.

After an attempt to postpone consideration of the reports until typewritten copies could be distributed to the committee of the whole was defeated,[485] a motion to adopt the majority report failed by a vote of nine to thirty-seven.[486] The committee of the whole then proceeded to discuss the minority report.[487] Several amendments to Proposition 88 were offered, but they all failed to pass,[488] as it must have become increasingly clear that the minority report had the support of the committee of the whole. The committee of the whole then approved Sections

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477. *See supra* text accompanying notes 361–65, 371–90.

478. Those making this recommendation on Proposition 50 were the same delegates that recommended the substitute language for Proposition 88, *see supra* note 468; text accompanying note 470, with the exception that Fred L. Ingraham was replaced by S.S. Keegan. *See* RECORDS, *supra* note 286, at 493. Ingraham and James E. Crutchfield made up the minority that were opposed to the deletion of the second sentence in Proposition 50. *Id.* The transcript does not indicate the make-up of the majority and minority regarding the recommendation that Proposition 47 be indefinitely postponed. *Id.* at 492.

479. *See* RECORDS, *supra* note 286, at 492–93.

480. *See infra* text accompanying notes 591, 605.

481. *See* RECORDS, *supra* note 286, at 541–42.

482. *See id.* at 542.

483. *See id.*

484. *See id.* at 541–42.

485. *See id.* at 542.

486. *See id.* at 543.

487. *See id.* at 543–44.

488. The first amendment offered was to strike the word "legislature" in line 1 of Section 1 and substitute the words "the legislative power of the state," but the motion was withdrawn after it was argued that it was tantamount to the people instructing themselves to enact an employers' liability law. *See id.* at 544. A second amendment to delete Section 1 was also defeated by virtue of a tie vote, 23 to 23. *Id.* at 544–45. A third amendment to Section 1 was designed to delete the direction to the legislature and instead have Section 1 state outright that employers would be liable for on-the-job injuries arising out of conditions in hazardous occupations unless the employee's negligence was wholly the cause of the injury or death. This amendment failed on a voice vote. *Id.* at 545.

1 and 2 of Proposition 88 as originally written.[489] The first section required the legislature to enact a statute that obligated employers to pay damages resulting from employees' injuries or deaths caused by conditions in hazardous occupations,[490] while the second sharply curtailed the common law defenses available to such employers.[491] This action resolved the dispute between the majority and minority factions of the Judiciary Committee as to whether the provisions of the employers' liability act should be left to the legislature or be included in the constitution itself. The committee of the whole then moved on to consider Sections 3, 4, and 5 of Proposition 88.

Both factions of the Judiciary Committee had already agreed that the substance of Sections 3, 4, and 5 were also covered by Propositions 50, 72, and 47,[492] respectively. At this point, a motion was made to adopt the minority report of the Judiciary Committee by substituting Proposition 50, as amended,[493] for Sections 3 and 5 of Proposition 88, but the chair ruled that "[w]e might just as well pass on Proposition 50 independently."[494] In its amended form Proposition 50 still consisted of two sentences. The first prohibited any legislative limit on damages for personal injury or death while the second outlawed contracts waiving such damages.[495] Acquiescing in the ruling by the chair, another motion was made, and seconded, simply to adopt Proposition 50, as amended.[496] In response, still another motion was made to amend the original motion to adopt Proposition 50 by adopting the majority report of the Judiciary Committee to delete the second sentence of Proposition 50.[497] The discussion on the motion to amend was short and to the point, focusing entirely on the second sentence of Proposition 50.

Those in favor of the minority report were concerned about the practice of employers, especially the railroads, of requiring employees, as a condition of employment, to waive their common law right to recover damages for personal injury or death in the workplace.[498] Apparently, the practice did not contemplate that an injured employee would not receive any compensation whatsoever. The employee's waiver was to be made in exchange for some agreed-upon benefits under the employment contract. According to the supporters of the minority report, their complaint was not that the employee would receive nothing at all; rather that the amount usually specified in the contract was too small and, therefore, unfair.[499]

In support of the majority report of the Judiciary Committee the constitutional argument in favor of deleting the second sentence prohibiting waivers was repeated by its chairman.[500] He pointed out that the Constitution of the United States guarantees the right of equal protection, and opined that it would be a

489. *See id.* at 545–46.
490. *See supra* text accompanying note 453.
491. *See id.*
492. *See supra* text accompanying notes 469–72.
493. *See supra* text accompanying notes 379–80, 388.
494. RECORDS, *supra* note 286, at 547.
495. *See supra* text accompanying note 380. This was the form supported by a minority of the Judiciary Committee. *See* RECORDS, *supra* note 286, at 547; *supra* text accompanying notes 407–13.
496. *See* RECORDS, *supra* note 286, at 547.
497. *See id.*
498. *See id.* at 547–48.
499. *See id.*
500. *See id.* at 548.

denial of this right to eliminate the opportunity for employees to enter into contracts waiving their rights to common law damages for personal injury or death.[501] The motion to amend lost and the minority report supporting the adoption of both sentences in Proposition 50 passed by a vote of twenty-seven to nineteen in the committee of the whole.[502]

After Proposition 50 was approved, Patrick F. Connelly, still in the committee of the whole, questioned the status of Sections 3, 4, and 5 of Proposition 88.[503] Apparently, he did not understand the effect of the chair's earlier ruling that Proposition 50 should be passed on "independently."[504] In response to Connelly's inquiry, the chair of the committee of the whole ruled that these three sections had been eliminated by amendment.[505] This may have been true for Sections 3 and 5, but it was not true for Section 4. However, the error was of no consequence because, after being sustained in this ruling, the chair proceeded to take up Proposition 72, proposing a workers' compensation system [506] which the Judiciary Committee previously had agreed was the same subject addressed in Section 4 of Proposition 88.[507] The committee of the whole promptly approved a motion on a voice vote to recommend to the convention that Proposition 72 be adopted.[508] This action apparently was deemed to displace Section 4 of Proposition 88, thereby justifying, in a *nunc pro tunc* fashion, the earlier ruling of the chair that Sections 3, 4, and 5 of proposition 88 had been displaced by the approval of Propositions 50 and 72.

After the committee of the whole approved Proposition 72 it took up Proposition 47.[509] The latter proposition also duplicated the second sentence of Proposition 50 and the now displaced Section 3 of Proposition 88 in that it outlawed contractual waivers of employees' rights to recover for injuries caused by employer negligence.[510] A majority of the Judiciary Committee recommended that the proposition be indefinitely postponed, but a minority of the Committee recommended its approval. Without discussion and even though Proposition 47 clearly duplicated the second sentence of Proposition 50, the committee of the whole adopted the minority report.[511]

Shortly thereafter, the committee of the whole arose and reported to the convention that it recommended that Propositions 47, 50, and 88, all as amended, and Proposition 72 "do pass."[512] The report was accepted and the convention voted that each proposition should be engrossed and have a third reading.[513] Whether the convention viewed these four propositions as an integrated set of provisions constituting an employers' liability act is difficult to discern at this point because they were still being processed as separate propositions even though Propositions 47, as amended, 50, as amended, and 72 had clearly dis-

501. *See id.*
502. *See id.*
503. *See id.* at 548–49.
504. *See supra* text accompanying note 494.
505. RECORDS, *supra* note 286, at 549.
506. *Id.* at 549.
507. *See supra* text accompanying notes 469–72.
508. RECORDS, *supra* note 286, at 549.
509. *Id.* at 549–50.
510. *See supra* text accompanying note 364.
511. RECORDS, *supra* note 286, at 550.
512. *Id.* at 554–55.
513. *Id.* at 555.

placed Sections 3, 4, and 5 of Proposition 88. This continued separate treatment, however, seemed to be dictated by the rules governing the procedures for handling propositions[514] because there is no record of any proposition losing its numerical identity by being merged into another proposition during the convention. Each proposition introduced at the convention was either adopted in some form or indefinitely postponed. As will be seen below, subsequent actions by the delegates, however, do indicate that these four propositions were being considered as the nucleus of the constitutional provisions that would govern employer liability.[515] These actions were directed at provisions that affected employer liability but that were located within propositions dealing with much broader subjects.

As explained above,[516] Substitute Proposition 6 also contained a provision that prohibited the legislature from enacting any law limiting the amount of damages recoverable for personal injury or death.[517] This limitation was still included in Substitute Proposition 6 when the committee of the whole and the convention approved it on November 23,[518] just one day after they had acted on Propositions 47, 50, 72, and 88. However, when the Committee on Style, Revision and Compilation reported that Substitute Proposition 6 was ready for final reading on November 30, the limiting provision had been removed.[519] In the words of the Chairman, "I believe that it was the sense of the committee to incorporate that [Section 19] along with the fellow-servant or employer's liability proposition or some other document of that kind."[520] This comment shows that the chair of the committee charged with the responsibility of compiling the constitutional provisions was already contemplating how the various provisions affecting tort law would ultimately be organized and arranged in the final document.

The same fate also awaited Section 14 of Substitute Proposition 22. At some point Section 14, which abolished the fellow-servant doctrine, was removed from Substitute Proposition 22 which provided the constitutional framework for regulating private corporations.[521] As the chairman of the Committee on Style, Revision and Compilation explained on December 3, Section 14 had not been part of Substitute Proposition 22 when the latter came up for final approval by the convention on the previous day.[522] After this explanation the convention went on to approve Section 14 separately with the understanding that it was to be compiled elsewhere in the constitution,[523] presumably with the employer liability provisions. Thus, it would appear that the Committee on Style, Revision and Compilation had decided sometime prior to December 3 to collect all the provisions concerning employer liability in one place in the constitution and that there was general agreement among the delegates on this plan.

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514. *See* Constitutional Convention of Arizona Standing Rules 52, 53, RECORDS, *supra* note 286, at 32–33.
515. *See infra* text accompanying notes 529–605.
516. *See supra* text accompanying notes 391–406.
517. *See supra* text accompanying note 401.
518. *See supra* text accompanying notes 428–29.
519. *See supra* text accompanying notes 430–31.
520. RECORDS, *supra* note 286, at 796.
521. *See supra* text accompanying notes 355–60.
522. *See* RECORDS, *supra* note 286, at 864.
523. *Id.*

In the meantime on December 1 the Committee on Style, Revision and Compilation reported on Propositions 47 and 50. First it recommended that the convention give final approval to Propositions 47 and 50 in their engrossed form.[524] The convention then proceeded to take up Proposition 47, but the chairman of the Style Committee asked that it be re-referred to his committee.[525] Apparently, the proposition had been improperly engrossed.[526] However, Proposition 50 in its engrossed form was unanimously approved by the convention on December 1 when the roll was called on final passage.[527] There was no discussion. Proposition 47 was again brought before the convention on December 3 and, without any discussion, was unanimously approved on final passage.[528]

The convention did not address the two remaining propositions—Propositions 72 and 88—until December 5 when the Committee on Style, Revision and Compilation reported it had examined Proposition 88 and recommended that the engrossed form be adopted.[529] Michael Cunniff, the chairman of the committee, reported that the proposition had been "revised more or less extensively and the phrases changed, especially in the second part."[530] He pointed out that the original language in Section 2 regarding the abolition of the fellow-servant doctrine[531] had been deleted "because that has been passed in another form."[532] Cunniff apparently was referring to the fact that Section 14, which had been a part of Substitute Proposition 22[533] and which also abolished the fellow-servant doctrine, had been finally approved by the convention two days earlier.[534] Therefore, it was the recommendation of the Style Committee that Proposition 88 be approved without any reference in that proposition to the abolition of the fellow-servant doctrine. Although Cunniff did not make it clear, apparently the Style Committee intended to take the language from Section 14 and make it a separate Section of the article in the constitution that was to contain all the provisions dealing with employer liability. In fact, that is what the Committee did when it fashioned Article XVIII, entitled labor, and submitted it to the convention for approval in adopting the constitution.[535] As will be seen later, however, the exact language of Section 14, which limited abolition of the doctrine to mines and railroads,[536] is not the actual language that was approved for the Arizona Constitution.[537] Be that as it may, the convention quickly accepted the Style Committee's report on Proposition 88.[538]

Proposition 88 was now on the floor of the convention with a committee recommendation that it be finally adopted. After a suggested minor change in

524. *Id.* at 815.
525. *Id.* at 818.
526. *Id.* at 848.
527. *Id.* at 821.
528. *Id.* at 848.
529. *Id.* at 881.
530. *Id.*
531. *See supra* text accompanying note 453.
532. RECORDS, *supra* note 286, at 881.
533. *See supra* text accompanying note 347.
534. *See supra* text accompanying notes 521–23.
535. *See infra* text accompanying notes 537–604.
536. *See supra* text accompanying notes 347–54.
537. *See infra* text accompanying note 605.
538. *See* RECORDS, *supra* note 286, at 881.

style was approved[539] and another more substantive criticism was ignored,[540] the delegates focused their attention on what remained of Section 2 after deleting the language abolishing the fellow-servant doctrine. Albert Baker led off by calling the whole proposition "contradictory and absurd."[541] As he read it, Proposition 88 entirely eliminated the employer's defenses of contributory negligence and assumption of risk.[542] In response Michael Cunniff, who not only chaired the Style Committee but also had introduced Proposition 88, spoke in support of the proposition,[543] arguing that the language had been taken from the Federal Common Carriers' Act.[544] He pointed out that the federal legislation and that of other nations had eliminated the defense of assumption of risk, as did Proposition 88, and further argued, though rather obliquely, that the latter did not eliminate contributory negligence but proposed a form of comparative negligence.[545] Baker

539. Michael Cunniff recommended that the word "asserted" in the last line of Section 2, *see supra* text accompanying note 453, be replaced by the word "alleged." This recommendation was adopted by the convention. RECORDS, *supra* note 286, at 881.

540. E.E. Ellinwood argued that, by listing certain hazardous occupations, for example, mining, smelting, manufacturing, and railroading, in Section 1, Proposition 88 would be construed, under the rule of *ejusdem generis*, to apply only to those specific occupations. RECORDS, *supra* note 286, at 881. However, Ellinwood's argument seems misplaced for two reasons. First, the rule of construction does not necessarily require that the general language be limited in its scope to the identical things specifically named; it could be interpreted as applying to things of the same general kind or class as those specifically mentioned. *See* BLACK'S LAW DICTIONARY 517 (6th ed. 1990). Second, the rule of construction does not apply when the context manifests a contrary intention. *Id.* The language of Section 1 went on to specify that it applied to hazardous occupations in "any other industry" in addition to those specifically mentioned. *See supra* text accompanying note 453.

541. RECORDS, *supra* note 286, at 881.

542. *Id.*

543. *See id.* at 881–82.

544. *See id.* at 882..

545. Cunniff's full remarks on the merits of Proposition 88 are as follows:

> I am not, however, so frightened as the gentlemen who have just spoken in regard to cutting out these common defenses that have existed for some little time. This does not necessarily mean that every time a man is injured the employer will be mulcted a large sum of money. It is merely to insure the using of every possible safety appliance and devise, and to make the employers hold life less cheaply. When the employer finds that there is likelihood of his being held liable for injury, he will be much more careful, and take every precaution for the safety of his employees. I submit that the proposition should be adopted. I will read from section 2 of the Federal Common Carriers' Liability Law, and also a few excerpts from the message of President Roosevelt proposing the adoption of this law. There had been a Federal Common Carriers' Liability Law enacted, and the Supreme Court had declared it unconstitutional because it covered not only interstate but intrastate commerce, over which the Federal government had no control. The President says: "The field of intrastate commerce will be left to the action of the several states. With this clear definition of responsibility, the states will eventually give to the matter the consideration the importance of the subject demands. Almost all civilized nations have enacted legislation embodying principles of this kind, and removing from the employee all the burden of the assumption of risk." To quote from the statute: "In all actions hereafter brought against such common carrier for railroad accident under or by virtue of any provisions of this act to recover damages for personal injury to the employee or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." In other words, even contributory negligence is not barred under the Federal statute. There is nothing novel in this proposition as presented here, and although gentlemen say they have never seen language like this in any

countered that "the bill is absolutely contradictory in its own terms and unfair,"[546] and that employers "would have no defense unless they could prove the man had committed suicide, because this says [in order for the employer to prevail] it must be wholly the negligence of the employee."[547]

Alfred Franklin also observed that he was in favor of a comparative negligence scheme, but that he could not support Proposition 88 because it was not clearly drafted like the federal legislation and it was so "doubtful" and "ambiguous" that the courts would be compelled "to set it aside."[548]

Although it is doubtful that the proposition was so poorly drafted that a court could not make sense out of it,[549] the wording did leave something to be desired. In the first place, Section 1 did not track the language of the federal employer's liability act. The federal legislation made it clear that the employer would only be liable where the employer was at fault,[550] whereas the first section of Proposition 88 was drafted in a manner that appeared to hold the employer liable without regard to fault.[551] As drafted, Section 1 seemed to say the employer would be liable for all accidents except for those caused entirely by the negligence of the employee making the claim. Thus, it appeared that the employer would be liable where neither the employer nor the employee was at fault in causing the injury, in addition to the situation where the employer was at fault. Further, although it was clear that the defense of assumption of risk would be abolished by what remained of Section 2, and that the fellow-servant doctrine would be abolished by another section, not until one read well into Section 2 would she understand that contributory negligence would remain available as a partial defense where both employer and employee were negligent in causing the injury.[552]

Only by reading Sections 1 and 2 together could it be discerned that the authors of Proposition 88 did not intend to hold the employer liable for all the damages when both the employer and employee were at fault. Once this joint responsibility was understood, a reader might begin to question whether the authors of the proposition really intended to hold the employer liable when an accident was not caused by the fault of either employer or employee. Perhaps such an interpretation was what moved Baker to remark that the only time the employer would not be liable was when an employee committed suicide.[553] Or

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> law book they have examined, that does not say that the proposition is not framed in unmistakable language. At least two of the revisions that were made used the phrasing of the Federal Common Carriers' Liability law instead of the phrasing used in this proposition originally. I submit that it has not been revised to any greater extent than other matter before us. I submit that this is a sound proposition, in line with the action of other nations, and the action of the United States government, and that this is more important for the protection of industrial workers than anything else that will appear in this constitution.

Id. at 881–82.

546. *Id.* at 882.

547. *Id.*

548. *Id.* at 883.

549. No doubt Franklin forgot that Proposition 88 was to be a part of the constitution and that a court would have had no authority to set aside a state constitutional provision unless it violated federal law.

550. *See supra* note 203 and accompanying text.

551. *See supra* text accompanying note 453.

552. *See id.*

553. *See supra* text accompanying note 547.

perhaps his concern simply resulted from the difficulty of following the backhanded approach taken in drafting Proposition 88.

In any event, Cunniff did not appear to be making much progress in persuading Baker and Franklin that Section 2 was neither ambiguous nor incomprehensible.[554] At that point, D.L. Cunningham, chairman of the Judiciary Committee, intervened to point out that the Oklahoma Constitution took a different approach to employer defenses, an approach which he said had in effect been recommended by his committee.[555] Article 23, Section 6 of the Oklahoma Constitution, as read by Cunningham to the convention, provided that "'[t]he defense of contributory negligence or of assumption of the risk shall in all cases whatsoever be a question of fact, and shall at all times be left to the jury.'"[556] In response, Cunniff was quick to point out that the Oklahoma provision was not at all what the Judiciary Committee had recommended.[557] Moreover, when the Yavapai County delegation was framing Proposition 88, according to Cunniff, it had specifically considered and rejected the Oklahoma provision as being "vague and unsatisfactory, and doubtful and obscure."[558]

Franklin and Baker, however, were steadfast in their opposition to abolition of assumption of risk and the proposed modification of contributory negligence, refusing to be persuaded by Cunniff that the federal model was appropriate and that it would not overly burden employers.[559] At that point, Franklin moved to substitute Section 6 of Article 23 from the Oklahoma Constitution for Section 2 of Proposition 88, Baker seconded the motion, and without any discussion it passed by a vote of twenty-six to twenty-one.[560] Baker then moved to strike the word "wholly" from the last line of Section 1, and his motion passed twenty-eight to nineteen.[561] Immediately thereafter, Cunniff offered an amendment "as to Section 3" of Proposition 88 providing: "'The right of action to recover damages for injuries shall never be abrogated, and the amount recoverable shall never be subject to statutory limitations.'"[562] Since the original section numbered 3 had been deleted when the convention approved the report of action in the committee of the whole which had substituted the two sentences from Proposition 50 for Sections 3 and 5 of Proposition 88,[563] Cunniff's motion to amend had the effect of adding a new Section 3 to Proposition 88. There is nothing in the record to indicate that he was attempting to amend the first sentence of Proposition 50 which was intended as a general prohibition against legislative limitations on damages[564] instead of a prohibition that applied only to employment situations. In any event, Cunniff's motion passed, again without any discussion,[565] and a roll call vote was taken on Proposition 88, which at this point would have read, as amended:

554. *See* RECORDS, *supra* note 286, at 883.
555. *Id.*
556. *Id.*
557. *Id.*
558. *Id.*
559. *Id.* at 884.
560. *Id.*
561. *Id.* at 884–85.
562. *Id.* at 885.
563. *See supra* text accompanying notes 502, 527.
564. *See supra* text accompanying notes 371–90.
565. RECORDS, *supra* note 286, at 885.

> Section 1. The Legislature shall enact, to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry, an employer's liability law, or employer's liability laws, which shall make any employer, whether individual, association, or corporation, liable for the death or injury by any accident due to a condition or conditions of such occupation of any employee in the service of such employer in such a hazardous occupation in all cases in which the death or injury of such employee by accident due to a condition or conditions of such industry shall not have been caused by the negligence of the employee killed or injured.
>
> Section 2. The defense of contributory negligence or of assumption of the risk shall in all cases whatsoever be a question of fact, and shall at all times be left to the jury.
>
> Section 3. The right of action to recover damages for injuries shall never be abrogated, and the amount recoverable shall never be subject to statutory limitations.[566]

Proposition 88 passed by a vote of forty-five to five.[567]

All within a matter of a few moments the convention rejected the abolition of assumption of risk and the adoption of a comparative negligence system as part of its employers' liability provision. Instead, the convention opted for a unique and untested provision from the Oklahoma Constitution. Then it added a provision in a new Section 3 that preserved causes of action for injuries, presumably prohibiting both the legislature and the courts from abrogating such actions, and denying to the legislature the power to limit the amount of damages that could be recovered in such actions. The latter was a very significant move because it was a substitute for some of the language that had previously been advanced in Proposition 50.[568]

Although the language of the new Section 3 was similar to the first sentence of Proposition 50,[569] it was broader because it not only prohibited the legislature from limiting the amount of damages in personal injury and death actions, as did Proposition 50, it prohibited the elimination of the underlying cause of action. Thus, the language in the new Section 3 would prevent the legislature, and the courts for that matter, from avoiding the damage limitation provision by totally eliminating the cause of action and thereby preventing the recovery of any damages at all. The fact that the new language of Section 3 was not intended to be a rephrasing of the language contained in Proposition 50 becomes even more evident when the fate of the latter is revealed below.[570] Moreover, all of this was accomplished under circumstances that made it reasonably clear as to exactly what was intended by these actions. Proposition 88 was intended to embody an employers' liability act and all of the action concerning it and the amendments to it appeared to be taken with the understanding that the three sections contained in it only applied to employees and employers, a point,

566. This amended version of Proposition 88 is not set out in the records of the proceedings of the convention, but it is clear from the proceedings that this is how it read when the roll call vote was taken in the convention on December 5, 1910.

567. RECORDS, *supra* note 286, at 885.

568. *See supra* text accompanying notes 407–13.

569. *See supra* text accompanying note 408.

570. *See infra* text accompanying notes 576–84.

as will be seen later, of considerable importance in interpreting the reach of this provision.[571]

On the same morning, December 5, with action on Proposition 88 stilled for the moment, the convention proceeded to take up Proposition 72 as the next item of business.[572] Things were now moving quickly as the convention had only a few matters left to address. An amendment to clarify the right of an employee to elect either the compensation offered by the employer or to sue in tort was approved.[573] Next a motion to postpone the proposition indefinitely was defeated,[574] and then Proposition 72 passed on final reading by a roll call vote of thirty-nine to nine.[575] The few remaining miscellaneous matters were disposed of and by that afternoon the convention was ready to begin placing its final approval on the constitution itself. The Committee on Style, Revision and Compilation had by now organized and compiled all the propositions that had been approved into the various articles and sections that would constitute the constitution of the new state.

G. Adoption of the Constitution

In an evening session on December 5, 1910, and after a few last minute matters were considered, the convention reconvened and resolved itself into a committee of the whole.[576] The Preamble and Article I were read and quickly approved.[577] The Secretary was asked to read Article II, which contained the Declaration of Rights.[578] At this time Article II consisted of thirty-two sections, none of which referred to any restriction on the authority of the legislature to limit damages in cases of personal injury or death.[579] However, when the Secretary finished reading Section 30 and before he could read Section 31,[580] Michael Cunniff rose to offer the following amendment:

> Mr. Chairman, I move that the following proposition, being Proposition Number 50 as revised and adopted by the convention be inserted here as Section 31. This is a matter of compilation, and it might as well be inserted. "No law shall be enacted by this state regulating the amount of damages for causing the death or injury of any person."[581]

The motion was adopted without discussion and the original sections numbered 31 and 32 were renumbered 32 and 33, respectively.[582] Moments later Article II was approved, as amended to contain thirty-three sections, by the committee of the whole.[583] The next morning, December 6, 1910, the convention adopted Article II, Declaration of Rights, as approved by the committee of the whole by a

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571. *See infra* text accompanying notes 610–98.
572. RECORDS, *supra* note 286, at 885.
573. *See supra* note 445 and accompanying text.
574. *See supra* note 448 and accompanying text.
575. *See supra* note 449 and accompanying text.
576. RECORDS, *supra* note 286, at 892.
577. *Id.* at 892–93.
578. *Id.* at 893.
579. *Id.* at 893–97.
580. *Id.* at 897.
581. *Id.*
582. *Id.*
583. *Id.* at 898.

vote of forty-two to seven.[584] Thus, it was the first sentence of Proposition 50 that eventually became Section 31 of Article II of the Arizona Constitution.

All of the other provisions concerning tort law were compiled in Article XVIII which was simply entitled "Labor." At this juncture the Committee on Style, Revision and Compilation had gathered all the provisions pertaining to employees and placed them within this article. In all, it contained nine sections. Section 1 of Proposition 88, requiring the legislature to enact an employers' liability law,[585] became Section 7 of Article XVIII and the other two sections of this proposition, one dealing with the defenses of contributory negligence and assumption of the risk[586] and the other dealing with the right to recover damages for injuries and prohibiting statutory caps on such damages,[587] became Sections 5 and 6, respectively, of Article XVIII. In addition to the three sections from Proposition 88, the Style Committee had added the language from Proposition 9, prescribing an eight hour work day for governmental employees,[588] as Section 1; the language from Proposition 141, dealing with child labor,[589] as Section 2; the language from Proposition 47, abolishing the fellow-servant doctrine,[590] as Section 3; a revised version of Section 14 originally from Proposition 22, outlawing employment contracts waiving the right to recover personal injury damages from employers,[591] as Section 4; the language from Proposition 72, instructing the legislature to enact a workers' compensation act,[592] as Section 8; and the language from Proposition 137, outlawing "black lists,"[593] as Section 9. Article XVIII came before the committee of the whole for final approval on the evening of December 7, 1910, but it was passed over at the suggestion of Michael Cunniff because a number of delegates were not in attendance.[594] The article was deferred to the afternoon of December 8[595] and was the second to the last article of the constitution to be considered.[596]

After some minor technical amendments were offered,[597] none of which pertained to the sections regarding tort law, the committee of the whole approved Article XVIII and recommended to the convention that it be adopted.[598] However, a few moments later Andrew Parsons noted that Proposition 48,[599] barring aliens from employment on public works, had not been included in any of the articles that had been approved.[600] The chairman of the Style Committee acknowledged that an omission existed in the printed version of the article on

584. *Id.* at 905–06.
585. *See supra* text accompanying note 566.
586. *Id.*
587. *Id.*
588. *See* RECORDS, *supra* note 286, at 1059, 1359.
589. *Id.* at 1382.
590. *See supra* text accompanying notes 364–70.
591. *See supra* text accompanying notes 347–60.
592. *See supra* text accompanying notes 435–50.
593. RECORDS, *supra* note 286, at 1381–82.
594. *Id.* at 956–57.
595. *Id.* at 981.
596. Only Article XXII, entitled "Schedule and Miscellaneous," remained to be acted upon. *Id.* at 982.
597. *See id.* at 981.
598. *Id.* at 982. Although the transcript of the proceedings for the afternoon of December 8 refers to Article XVII, it is clear that this is an error and that the article to which reference was intended is Article XVIII.
599. *See id.* at 1146.
600. *See id.* at 983.

labor, explaining that Proposition 48 had been compiled as Section 10 of Article XVIII, but that it had been omitted by the printer.[601] After a motion to strike Section 10 was made and defeated,[602] the committee of the whole again approved the article, now containing ten sections.[603] This was the last action taken to make any changes in Article XVIII.

The convention adopted Article XVIII by a vote of thirty-nine to ten on the afternoon of December 8, 1910.[604] The final version in its entirety reads as follows:

> ARTICLE XVIII. LABOR.
>
> SECTION 1. Eight hours and no more, shall constitute a lawful day's work in all employment by, or on behalf of, the State or any political subdivision of the State. The Legislature shall enact such laws as may be necessary to put this provision into effect, and shall prescribe proper penalties for any violations of said laws.
>
> SECTION 2. No child under the age of fourteen years shall be employed in any gainful occupation at any time during the hours in which the public schools of the district in which the child resides are in session; nor shall any child under sixteen years of age be employed underground in mines, or in any occupation injurious to health or morals or hazardous to life or limb; nor in any occupation at night, or for more than eight hours in any day.
>
> SECTION 3. It shall be unlawful for any person, company, association, or corporation to require of its servants or employees as a condition of their employment, or otherwise, any contract or agreement whereby such person, company, association, or corporation shall be released or discharged from liability or responsibility on account of personal injuries which may be received by such servants or employees while in the service or employment of such person, company, association, or corporation, by reason of the negligence of such person, company, association, corporation, or the agents or employees thereof; and any such contract or agreement if made, shall be null and void.
>
> SECTION 4. The common law doctrine of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from the acts or omissions of any other servant or servants of the common master is forever abrogated.
>
> SECTION 5. The defense of contributory negligence or of assumption of the risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.
>
> SECTION 6. The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.
>
> SECTION 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such

601. *Id.*
602. *Id.* at 984.
603. *Id.*
604. *Id.* at 987.

employee shall not have been caused by the negligence of the employee killed or injured.

SECTION 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any laws affecting such employment; Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution.

SECTION 9. The exchange, solicitation, or giving out any labor "black list," is hereby prohibited, and suitable laws shall be enacted to put this provision into effect.

SECTION 10. No person not a citizen or ward of the United States, or who has not declared his intention to become a citizen shall be employed upon, or in connection with, any State, county or municipal works or employment; Provided, that nothing herein shall be construed to prevent the working of prisoners by the State, or by any municipality thereof, on street or road work, or other public work. The Legislature shall enact laws for the enforcement, and shall provide for the punishment of any violation, of this section.[605]

The only remaining matter for the convention to pass on regarding the constitution itself was the design of the state seal. After some rather impassioned pleas to retain the territorial seal,[606] a motion to approve a new design for the state seal was approved and made part of Article XXII.[607] With this action the work of drafting a constitution for the forty-eighth state was completed. The convention gave final approval to the document by a vote of forty to twelve on the afternoon of December 9, 1910[608] and moments later adjourned *sine die*.[609]

V. FOR WANT OF A QUESTION: SOME MATTERS OF CONSTRUCTION

As one would expect, over time a number of questions have been raised about the meaning of various provisions of the Arizona Constitution. Among these have been issues concerning the respective roles of the legislature and the courts in developing and modifying tort law. As stated at the outset,[610] the purpose of this Article has been to examine the political background to the constitutional convention of 1910 insofar as tort issues were concerned and to trace the origin of and step-by-step process by which the constitutional provisions concerning tort law were adopted at the convention. The purpose of such efforts was to gain a better understanding regarding the framers' intent in adopt-

605. *Id.* at 1435–36.
606. *See id.* at 994–97, 1002.
607. *Id.* at 1002.
608. *Id.* at 1009.
609. *Id.* at 1012.
610. *See supra* pp. 539–40.

ing two particular constitutional provisions—Section 31 of the Declaration of Rights[611] and Section 6 of the article entitled Labor.[612] Now that the examination and tracing have been accomplished, it is time to turn to some basic issues that loom large in any effort by the legislature to make fundamental changes in the common law that determines how those whose rights are governed by Arizona law are to be compensated for injuries that they sustain to their persons or property.

One of the basic issues regarding tort reform efforts concerns the relation of Section 31 of Article II to Section 6 of Article XVIII of the Arizona Constitution. It is obvious that the language of the former provision, in prohibiting any legislative limit on damages recoverable in injury or death cases,[613] duplicates the language in the second clause of the latter provision, which also declares that damages for injuries shall not be subject to any statutory limitation.[614] There is no doubt from reading the record of the constitutional convention that this apparent duplication was not done out of ignorance or oversight. Yet, the very fact that it was deliberate raises serious questions about whether the framers really intended for the two provisions to have the identical effect, a sort of belt and suspenders approach to the perceived problem. An affirmative answer to this question hardly seems plausible, or at least deserves more careful analysis than it has received, in light of what has been revealed above about the events leading up to and the attention paid to the subject of tort awards during the convention.

To start with, it is rather amazing that over seventy years would pass before any attempt would be made to explain how the prohibition against statutory limits on damages in Section 31 of Article II and Section 6 of Article XVIII both came to be included in the Arizona Constitution. Be that as it may, it was not until 1984 when the Arizona Supreme Court was called upon in *Kenyon v. Hammer*[615] to determine the constitutionality of a medical malpractice statute of limitations pertaining to minors that the matter was explored at all. Prior to that time, the Arizona Supreme Court appears merely to have assumed that these two damage limitation provisions were essentially fungible.[616]

The *Kenyon* court, in a rather lengthy footnote, did attempt to explain how these two provisions protecting the recovery of damages came into being.[617] In doing so the court stated that "[b]oth of the present constitutional provisions are drawn from Proposition 50 which was introduced at the convention by Delegate Parsons (Dem. Cochise, lawyer)"[618] and then went on to explain how Proposition 50, which originally was aimed at employee actions against employers, was amended to apply to all actions for injury or death.[619] The court also explained how Proposition 50, as amended, was substituted for Sections 3 and 5 of

611. *See supra* p. 538.
612. *Id.*
613. *Id.*
614. *Id.*
615. 142 Ariz. 69, 688 P.2d 961 (1984).
616. *See* Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 151, 166–67, 166 P. 278, 284 (1917); Indus. Comm'n v. Frohmiller, 60 Ariz. 464, 468, 140 P.2d 219, 221 (1943); Kilpatrick v. Super. Ct., 105 Ariz. 413, 419–20, 466 P.2d 18, 24–25 (1970); Halenar v. Super. Ct., 109 Ariz. 27, 28, 504 P.2d 928, 929 (1972).
617. Kenyon v. Hammer, 142 Ariz. 69, 79 n.9, 688 P.2d 961, 971 n.9 (1984).
618. *Id.* at 79–80 n.9, 688 P.2d at 971–72 n.9.
619. *Id.* at 80 n.9, 688 P.2d at 972 n.9.

Proposition 88, but later was amended again when Michael Cunniff offered and the convention adopted the language that ultimately became Section 6 of Article XVIII of the Arizona Constitution.[620] Finally, the *Kenyon* court also explained how Cunniff subsequently moved and the convention adopted the sentence in Proposition 50 prohibiting legislative limits on damages, the language that ultimately became Section 31 of Article II of the Arizona Constitution.[621]

In providing this explanation as to the origin and adoption of the two constitutional provisions the court ultimately came to the following conclusion:

> Through the course of the convention, proposition 50 had evolved from a provision to serve the parochial interests of labor to one that stood alone as an expression of the delegates' belief that a right of action for damages was a guarantee to all persons. References to particular industrial contexts and cross-references to other sections of the labor article were removed so that the "no abrogation" provision would clearly reflect its broad intent to protect all. In fact, the original proposition 50 was completely changed by delegate Cunniff's substitution (which is now Art. 18, § 6, Ariz. Const.). This did not escape Cunniff's attention, for he later moved that Proposition 50, as revised and adopted by the convention be included as Section 31 of the declaration of rights article as "a matter of compilation", it having already been adopted in Article 18. Journal, December 5, 1910, p. 2. The motion prevailed apparently by voice vote. *Id.*, Night Sess. Thus, both Art. 2, § 31 and Article 18, § 6 appear today in the Constitution as fundamental guarantees to the people of Arizona. What happened to the first clause of Article 18, § 6 in "the compilation" which became art. 2, § 31 is not readily apparent from a reading of the Journal. It is obvious, however, that the two provisions were intended to guarantee the same basic right.[622]

Thus in summary, the court opined that the two provisions in question indeed where identical in purpose; that is, they were adopted to guarantee the same basic right.

Yet, how could it be that a person as well informed as Michael Cunniff[623] was about the intricacies of organizing and the interrelationship among the provisions of the constitution, particularly those affecting the right to recover tort damages, intend what was, according to the construction of the *Kenyon* court, a vain thing by inserting a provision in the Declaration of Rights that merely duplicates another provision in the labor article? Could it be that there is a different and better explanation, one that would in reading the relevant parts together[624] instill in each of the two provisions in question a life of its own?

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620. *Id.*

621. *Id.* at 80–81 n.9, 688 P.2d at 972–73 n.9.

622. *Id.*

623. Cunniff not only served as the chairman of the Committee on Style, Revision and Compilation, but he actively participated at the convention, and he was extremely well educated and knowledgeable about Arizona politics. He was educated at the Boston Latin School and Harvard University, receiving both an A.B. and A.M. from the latter. He was an instructor in English at Harvard and the University of Wisconsin before becoming managing editor of *World's Work*, one of the leading magazines of the time in America. He was very active in Arizona politics as a member of the territorial and Yavapai Democratic central committees and wrote the greater part of the last Democratic territorial platform. He was also chairman of the committee that produced the platform upon which the Democrats of Yavapai County made their campaign for delegates to the constitutional convention. *See Constitution Makers*, ARIZONA DEMOCRAT, Oct. 14, 1910, at 4.

624. The Arizona courts have long recognized that the constitution must be construed as a whole so as to give effect to all of its parts: "In construing the provisions of the Constitution,

In pursuing this question, one is reminded of Justice Felix Frankfurter's admonition about statutory interpretation which is surely as appropriate, if not more so, when it comes to discerning the intent of the framers of a constitution. In this regard, Frankfurter said: "In matters of statutory construction ... it makes a great deal of difference whether you start with an answer or with a problem."[625] In keeping with this admonition, one should think first about the problem that concerned the delegates to the constitutional convention of 1910. As revealed earlier, the main concern at this time across the country, as well as in Arizona, was the plight of the worker who, when injured on the job, was faced with a formidable trilogy of defenses—fellow-servant doctrine, assumption of risk, and contributory negligence—when a tort action was brought against the employer.[626] In fact, this concern was the only concern regarding damage suits documented in the party platforms upon which delegates sought to be elected.[627] Although there was mention in the newspapers of the earlier monetary limit in wrongful death cases,[628] the fact that the concern over on-the-job injuries was foremost in the minds of the delegates was further born out by the fact that Proposition 50 as originally introduced at the convention was aimed at providing relief only for employees.[629]

To be sure, Proposition 50 subsequently was amended to apply generally.[630] And, just as surely, there should be no doubt whatsoever that when Cunniff eventually moved to insert the language from it regarding the prohibition on statutory limits on damages in injury and death cases as Section 31 of the Declaration of Rights that this prohibition was intended to apply to all tort actions, at least those recognized in Arizona at the time,[631] involving bodily harm.[632] However, this is where Frankfurter's admonition that one should always start with the problem rather than the answer weighs heavily because, even though there should be no question about the basic reach of Section 31 of Article II, there is a very serious question of whether Section 6 of Article XVIII was ever

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it is clearly necessary that we consider the instrument as a whole, and endeavor to give such a construction to each and every part as will make it effective and in harmony with all the other parts." Corp. Comm'n v. Pacific Greyhound Lines, 54 Ariz. 159, 170, 94 P.2d 443, 447 (1939).

625. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947). I am indebted to Millard H. Ruud, one of my law professors and still a member of the University of Texas Law School faculty, for pointing out this article and quote to me.

626. *See supra* text accompanying note 251.

627. *See supra* text accompanying notes 199–207.

628. *See supra* text accompanying notes 231–35.

629. *See supra* text accompanying notes 371–78.

630. *See supra* text accompanying notes 379–89.

631. Whether Section 31 of Article II was intended to apply only to those actions existing in 1912 when the constitution took effect or also to actions recognized subsequently has been a matter of dispute. This issue also exists as to Section 6 of Article XVIII. *See* Indus. Comm'n v. Frohmiller, 60 Ariz. 464, 140 P.2d 219 (1943); Bryant v. Continental Conveyor Equip. Co., 156 Ariz. 193, 751 P.2d 509 (1988).

632. The Supreme Court of Arizona has held that Section 6 of Article XVIII also protects the right to recover damages in tort actions involving injuries other than bodily harm. *See* Boswell v. Phoenix Newspapers, Inc., 152 Ariz. 9, 730 P.2d 186 (1986). Presumably the court would reach the same conclusion regarding Section 31 of Article II since it views the two provisions as guaranteeing the "same basic right." *See supra* text accompanying note 622. However, the record of events leading up to and the proceedings during the convention do not lend much, if any, support for this interpretation since the only references were to situations involving bodily injury or death. There was nary a word about other types of harm. *See infra* text accompanying notes 676–78.

intended to apply outside the employment context. In other words, it would appear that with regard to the latter issue the courts in Arizona have always started with an answer instead of a question.

In the first Arizona Supreme Court case after the Arizona Constitution was adopted that spoke to the reach of Section 6 of Article XVIII, the Court's remark was not only *dictum* but was made without any inquiry as to the framers' intent. In *Alabam's Freight Co. v. Hunt*,[633] the court was faced with a number of constitutionally based challenges to the validity of an amendment to the workers' compensation statute that would require a worker to make an election of remedies in advance of injury.[634] One of the challenges involved the argument that while the constitutional amendment extended the election to all employees the implementing legislation limited the election to only those employees engaged in hazardous occupations.[635] If the employee was not engaged in hazardous work then, according to the argument, the employee was only entitled to workers' compensation benefits and could not elect to pursue a common law remedy.[636] Thus, the claim was made that the statute was unconstitutional because it abrogated a non-hazardous worker's right under Section 6 of Article XVIII to sue an employer for having negligently caused harm to the employee.[637] The respondent argued that Section 6 only guaranteed an employee the rights provide in Sections 7 and 8 of Article XVIII, and not the common-law right to sue the employer for negligence.[638]

The Supreme Court of Arizona agreed in the *Alabam's Freight* case that the statutory amendment was unconstitutional to the extent it denied an employee the right to elect to pursue a common-law negligence action against the employer in lieu of compensation benefits.[639] In doing so the court announced that the common-law action of negligence, by virtue of the prohibition against its abrogation found in Section 6 of Article XVIII, "was taken from its status as one subject to the will of the Legislature and imbedded in the Constitution"[640] and that "its principal incidents were placed beyond legislative control."[641] Moreover, after making these general pronouncements, the court concluded by explaining that it was true that the negligence action:

> was available under proper circumstances to others besides employees, *but for these last it was a remedy available against an employer and guaranteed by the Constitution.* To hold that a right of action whose

633. 29 Ariz. 419, 242 P. 658 (1926)

634. Previously the Supreme Court of Arizona had held that under the original Section 8 of Article XVIII of the Arizona Constitution and the underlying legislation implementing the workers' compensation system in Arizona that an employee had the right to make an election of remedies after being injured. Consol. Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 139 P. 465 (1914). Subsequently, the constitution was amended on September 29, 1925 to broaden the workers' compensation coverage, guarantee the amount of compensation, and require that the election be made prior to injury. Legislation was passed to implement this amendment to the constitution. *See* Kilpatrick v. Super. Ct., 105 Ariz. 413, 417, 466 P.2d 18, 22 (1970). It was the latter legislation that was being attacked as unconstitutional in *Alabam's Freight Co.*, 29 Ariz. at 419, 242 P.2d at 658.

635. *Alabam's Freight Co.*, 29 Ariz. at 439, 242 P. at 664.

636. *Id.*

637. *Id.* at 439–42, 242 P. at 664–65.

638. *Id.* at 442, 242 P. at 665.

639. *Id.* at 444, 242 P. at 666.

640. *Id.* at 443, 242 P. at 665.

641. *Id.* at 443, 242 P. at 666.

> abrogation was forbidden by the Constitution can be taken away by a statute, against the will of one to whom it belonged, merely because it was not originally created by that Constitution for his benefit exclusively, on the theory that the words "provided by this Constitution" must be read "created by this Constitution," would be contrary to every principle of construction. *The common-law action of negligence, as modified by the Constitution, is now as much "provided" by that instrument for the benefit of all, be they employees or others,* as are the Employers' Liability Law or the Compensation Act, for certain classes of employees, and no statute can take away the right to pursue it without granting a reasonable election to all who, on the facts, are entitled to it.[642]

Although one might point out that the language first emphasized in the quote appears to say the negligence action is only guaranteed by the constitution to employees, the succeeding language clearly contradicts this more narrow view when it states that the constitution guarantees the action "for the benefit of all, be they employees or others." Yet, it does not appear from the case that the court was called upon to make the broader pronouncement because the issue upon which the statute was declared unconstitutional only involved an employee's right to an election. It did not involve any right of a non-employee.[643] However, even if a pronouncement on non-employee rights was necessary to the decision, there was no inquiry or discussion why a provision in a constitutional article entitled "Labor" should be construed to guarantee anything to anyone outside the employment context. Thus, the court provided an answer to a question that was never asked.

For better or worse, the "benefit for all" language was not only the starting point but the end to any careful judicial inquiry concerning the question of whether Section 6 of Article XVIII was intended by the framers to cover non-employment situations. Since the *Alabam's Freight* decision the Supreme Court of Arizona has never indicated that there is any reason to question the scope of Section 6 of the labor article in this regard.[644] In addition, having started with the answer to one provision, it has indeed made a great deal of difference in how Section 31 of Article II and Section 6 of Article XVIII have been construed.[645] To say that they both protect the same basic right has, as a practical matter,

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642. *Id.* 443–44, 242 P. at 666 (emphasis added).

643. *See id.* at 439–45, 242 P. at 664–66.

644. *See Kenyon,* 142 Ariz. at 81–83, 688 P.2d at 973–75; Barrio v. San Manuel Div. Hosp. for Magma Copper Co., 143 Ariz. 101, 104, 692 P.2d 280, 283 (1984); Boswell v. Phoenix Newspaper, Inc., 152 Ariz. 9, 12–14, 730 P.2d 186, 189–91 (1986); *see also Bryant,* 156 Ariz. at 197–202, 751 P.2d at 513–18 (1988) (Feldman, J., dissenting).

645. In an effort to harmonize the two provisions completely so as to give them the identical effect even though the language of Section 31 of Article II says nothing regarding abrogation of a cause of action as does Section 6 of Article XVIII, the court in *Kenyon* offered this supposition:

> It is fair to suppose that by curtailing the legislature's power to limit the amount of damages recovered the convention intended to proscribe legislation which would abolish or abrogate causes of action, since abrogation not only limits the amount recoverable but allows no recovery at all. This was the original intent of Proposition 50, before the clause proscribing abrogation was added by amendment.

Kenyon, 142 Ariz. at 81, 688 P.2d at 973 n.9. This supposition, however, does not appear to be well founded. *See infra* text accompanying notes 681–99.

rendered Section 31 of Article II superfluous.[646] Had the inquiry come before the answer, what might the court have found as to the framers' intent?

Article XVIII was compiled by gathering all the provisions in the constitution directly affecting the rights of employees and placing them in one article entitled "Labor."[647] All but two of the ten sections comprising this article[648] explicitly refer to and are clearly limited to employment situations. The two that do not make reference to employment situations are Section 5, limiting the defense of contributory negligence,[649] and Section 6, prohibiting either the abrogation of the right of action to recover damages for injuries or the statutory limitation of damages for such injuries.[650] However, even though there is no explicit reference to employment situations in these two sections,[651] the title of the article and the juxtaposition of the sections alone would appear to raise questions about the framers' intent. This should lead one to examine the historical underpinnings.

By the morning of December 5, 1910, the delegates to the convention were ready to take up the two propositions that clearly were directed at changing the common law regarding employer liability for injuries to employees. The first was Proposition 88, which was clearly billed as an employers' liability law,[652] and the second was Proposition 72, which was identified as a compulsory workers' compensation proposal.[653] Proposition 88, as introduced, contained five sections;[654] however, all that remained on December 5 from the original draft were Sections 1 and 2. Section 1 required the legislature to enact a statute imposing liability on all employers for injury or death caused by a condition or conditions arising from a hazardous occupation unless the injury or death was caused wholly by the negligence of that employee.[655] Section 2 abolished the employer's defenses under the fellow-servant doctrine and assumption of risk.[656] Proposition 50, which as amended prohibited the legislature from enacting a statutory limit on the amount of damages recoverable for personal injury or death and outlawed contractual waivers of tort rights in general,[657] and Proposition 72, the workers' compensation proposal, had displaced similar subject matter in the last three sections of the original version of Proposition 88.[658] As explained on the morning of the December 5 by Michael Cunniff, another change in the meantime had been made in Proposition 88. The Committee on Style, Revision and Compilation had deleted the provision in Section 2 regarding the abolition of the fellow-servant

646. When a litigant attempts to invalidate legislation curtailing tort rights, Section 6 of Article XVIII is most often the basis for the challenge. When litigants do resort to Section 31 of Article II it usually is in addition to a challenge under Section 6 of Article XVIII and most often the courts rely on the latter provision in declaring legislation limiting tort rights unconstitutional. *See supra* note 644.

647. *See supra* text accompanying notes 576–605.

648. *See supra* text accompanying note 605.

649. *Id.*

650. *Id.*

651. Not all of the provisions in the original draft of Proposition 88 had explicit references to the fact that they pertained only to employment situations. Yet it is clear that they were intended as part of an employers' liability law. *See supra* text accompanying note 453.

652. *See* RECORDS, *supra* note 286, at 72–73.

653. *See id.* at 65–66.

654. *See supra* text accompanying note 453.

655. *See supra* text accompanying notes 481–528.

656. *Id.*

657. *See supra* text accompanying notes 379–80, 422.

658. *See supra* text accompanying notes 503–08.

doctrine because, as Cunniff pointed out, a similar provision had already been approved by the convention.[659] With the adoption of this change that morning, Proposition 88 was recommended by the Committee on Style, Revision and Compilation for final approval,[660] but that is not what happened as a major turn of events occurred.

Once debate was opened, the first two sections of Proposition 88 came under severe criticism by Albert Baker and Alfred Franklin.[661] They argued that the proposition was terribly unfair to employers because it eliminated the defenses of assumption of risk and contributory negligence.[662] Michael Cunniff, who had originally introduced Proposition 88,[663] attempted to defend it on the grounds that Proposition 88, as amended, was patterned after the Federal Common Carriers' Act.[664] He pointed out that the federal legislation, as well as that of other nations, eliminated the defense of assumption of risk and transformed the defense of contributory negligence to one of comparative fault[665] in an attempt to persuade his opponents that Proposition 88 embodied a sound approach to the problem of employer liability for on-the-job accidents.

It was at this point in the floor debate that D.L. Cunningham, chairman of the Judiciary Committee, intervened to point out that Oklahoma had provided in its constitution that both the defense of contributory negligence and assumption of risk be retained and that their application was left solely within the province of the jury.[666] Although Cunniff was quite critical of the Oklahoma provision[667] and eloquent in his defense of Proposition 88,[668] Franklin successfully moved to substitute the language of the Oklahoma Constitution for that of Section 2 of the employers' liability law.[669] Immediately thereafter Baker moved to strike the word "wholly" from the last clause of Section 1.[670] After Baker's motion passed, Cunniff then moved to amend Section 3 of the employers' liability law by substituting the language that ultimately was compiled as Section 6 of Article XVIII.[671] Cunniff's motion passed without discussion,[672] and shortly thereafter, Proposition 88 embodying the employers' liability law was adopted by the convention as amended.[673] A few moments later action was also completed on the workers' compensation provision and Proposition 72 passed on final reading.[674]

Several points need to be emphasized regarding the floor action on the morning of December 5 and how that action relates to the various propositions affecting tort rights and responsibilities. First, all of the debate regarding Proposition 88 was directed toward establishing an employers' liability law.

659. *See supra* text accompanying notes 529–34.
660. *See supra* text accompanying note 538.
661. *See supra* text accompanying notes 541–48.
662. *Id.*
663. *See supra* text accompanying note 452.
664. *See supra* text accompanying notes 543–44.
665. *See supra* text accompanying note 545.
666. *See supra* text accompanying notes 555–56.
667. *See supra* text accompanying notes 557–58.
668. *See supra* note 545.
669. *See supra* text accompanying note 560.
670. *See supra* text accompanying note 561.
671. *See supra* text accompanying note 562.
672. *See supra* text accompanying note 565.
673. *See supra* text accompanying note 567.
674. *See supra* text accompanying notes 572–75.

There was no mention or even a suggestion that any of the provisions discussed would apply outside the employer-employee context. Second, the only mention during the entire convention that any of the seven propositions affecting tort law should apply outside the employment setting was with regard to Proposition 50.[675] Third, all of the discussion regarding these seven propositions clearly was in the context of rights and responsibilities regarding bodily injury or death.[676] There was no mention during the convention of any other type of injuries, which would be in keeping with the fact that employees were most often the victims of bodily injury or death and this was what concerned the delegates and society in general at that time.[677] Last, this focus on bodily injury and death in the employment context during the convention is completely in harmony with the issues that were raised in the process of electing delegates to the constitutional convention.[678] Thus, when the language from the Oklahoma Constitution[679] and that subsequently offered by Michael Cunniff[680] was adopted by the convention, it was all with reference to an employer's liability and there is very little, if anything, that can be gleaned from the proceedings to indicate that Sections 5 and 6 of Article XVIII were ever meant to apply to non-employment situations.

As far as Section 6 is concerned, there was no intimation that it was somehow related to the broader purpose embodied in the amended version of Proposition 50.[681] It is readily apparent that Michael Cunniff offered the language that became Section 6 of Article XVIII as part of an employers' liability law and that he must have no longer considered the amended language of Proposition 50 appropriate for this purpose.[682] Otherwise, there would have been no reason at this point to coin new language to replace the two sentences of Proposition 50 which had previously been approved by the delegates in lieu of the original language of Proposition 88 regarding contractual waivers of damages by employees and the prohibition against statutory limits on recoveries for personal injury or death. In fact, the new language offered by Cunniff on the morning of December 5 was materially different from that either in the original or amended versions of Proposition 50.

Section 6 of Article XVIII prohibits the abrogation of the right to recover damages for injuries or any statutory limitation on the amount to be recovered.[683] This provision is at once broader and narrower than Proposition 50. It is broader

675. *See supra* text accompanying notes 374–90.
676. *See supra* text accompanying notes 343–609.
677. *See supra* notes 189, 199–208, 225–29, 253–60 and accompanying text.
678. *See supra* text accompanying notes 199–247.
679. *See supra* text accompanying note 556.
680. *See supra* text accompanying note 562.
681. *See supra* note 380 and accompanying text.
682. In footnote nine in *Kenyon,* 142 Ariz. at 79, 688 P.2d at 971, it was initially stated that both Section 6 of Article XVIII and Section 31 of Article II were taken from Proposition 50, but subsequently in the note it was acknowledged that the language in Section 6 was completely different from that in Proposition 50. Still later in the note it was stated that the clause proscribing abrogation was added by amendment. *Id.* In a later case, the author of footnote nine in *Kenyon* opined that the source of the language in Section 6 was Section 7 of Article 23 of the 1907 Oklahoma Constitution which provided: "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation ...." *Bryant,* 156 Ariz. at 199, 751 P.2d at 515 n.2. The Oklahoma provision does appear to be the source and, if so, it provides further support that Section 6 did not have its origins in Proposition 50, which is contrary to what was said in *Kenyon.*
683. *See supra* text accompanying note 605.

not only in the respect that it speaks to any attempt to completely eliminate the right to recover damages by abrogating the cause of action, but it also could be read to enjoin the courts as well as the legislature in this respect.[684] After all, it was not the legislature that created the defenses under the fellow-servant doctrine, assumption of risk, and contributory negligence, it was the courts.[685] Moreover, Section 6 speaks only of the right to recover damages for "injuries"[686] and makes no reference to death cases,[687] and in this respect is narrower than Proposition 50.[688]

These clear differences in language and the fact that Cunniff's amendment was offered in the context of an employers' liability law would appear to evince a different purpose than that underlying Proposition 50. Just as there would have been no need for Cunniff to substitute the new language which became Section 6 of Article XVIII for the language in Proposition 50 in the employers' liability law if both provisions were identical in purpose, there would have been no need for Cunniff to come back on the afternoon of December 5 to add the clause from Proposition 50 prohibiting the legislature from limiting damages in injury and death cases when the Declaration of Rights was being considered by the committee of the whole.[689] The matter would have already been covered in Section 6 of Article XVIII.[690] A more plausible reason for Cunniff's action than that he was

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684. Arguably, since the Oklahoma counter-part only addressed wrongful death claims, the injunction was aimed solely at the legislature. *See supra* note 682.

685. *See supra* text accompanying notes 250–51.

686. *See supra* text accompanying note 605.

687. If Cunniff did use Section 7 of Article 23 of the Oklahoma Constitution as a template, he surely must have understood that the term "injuries" was not used at that time to refer to death actions since the courts had yet to recognize a cause of action for wrongful death. At the very least, he had to understand that Proposition 50 spoke of "death or injury," *see supra* text accompanying note 373, just as the first section of Proposition 88, which he helped draft and introduced, spoke of an employee being killed or injured. *See supra* text accompanying note 453.

688. In *Kenyon,* an attempt was made to equate the effect of the language of Section 31 of Article II with Section 6 of Article XVIII:

> It is obvious, however, that the two provisions were intended to guarantee the same basic right. It is fair to suppose that by curtailing the legislature's power to limit the amount of damages recovered [in Section 31 of Article II] the convention intended to proscribe legislation which would abolish or abrogate causes of action, since abrogation not only limits the amount recoverable but allows no recovery at all. This was the original intent of Proposition 50, before the clause proscribing abrogation was added by amendment.

Id. at 81, 688 P.2d at 971 n. 9.

Aside from the rather strained construction of the obvious difference in wording, there are a number of other reasons why the two provisions were intended to be different in purpose. First, all the evidence prior to the convention points to the fact that it was the earlier $5000 limitation on damages in wrongful death actions that spawned this language in Proposition 50. *See supra* text accompanying notes 248–91. Second, the origin of Section 6 of Article XVIII probably was not Proposition 50. *See supra* note 682. Thus, Proposition 50 was not being amended when Michael Cunniff offered the new language regarding abrogation which became Section 6. Third, it is reasonably clear that Section 6 was aimed only at employment situations. *See infra* text accompanying notes 689–99. Finally, reading the two provisions as saying the same thing attributes to Michael Cunniff an ineptitude that surely did not exist. *See supra* note 623 and accompanying text.

689. *See supra* text accompanying note 581.

690. In *Kenyon,* Cunniff's action on the afternoon of December 5 is treated only as a matter of compiling the duplicate language from Proposition 50 in the Declaration of Rights. *Id.* at 80, 688 P.2d at 973 n.9. *See supra* text accompanying note 622. This characterization is only accurate if one agrees that the language from Proposition 50 is in fact redundant. The fact that Cunniff said that the language to be inserted was "a matter of compilation" says little

merely taking a belt and suspenders approach may be found in his concern over the plight of injured employees.

Cunniff had just lost the argument with Baker and Franklin that assumption of risk should be abolished and comparative negligence should be substituted for contributory negligence in the employers' liability law that he had proposed.[691] This was a big setback because under Franklin's successful motion[692] both defenses were again available as a complete bar to an action by an injured employee, albeit that the power of the courts to rule that either had been established as a matter of law had been curtailed.[693] Although an employee was still guaranteed the right to sue under Section 1 of Proposition 88 without the burden of proving fault on the part of the employer, this guarantee was only available where the employee's occupation was hazardous.[694] Also, Albert Baker had been successful in broadening the defense of contributory negligence under Section 2 so that an injured employee's negligence did not have to be the sole cause of the accident before a jury could bar recovery under this defense.[695]

To pursue a tort remedy outside Section 1 of Proposition 88, the employee had to sue under the common law[696] and there was nothing in any of the propositions introduced at the convention affecting tort law that specifically guaranteed that right to an employee. Rather than attribute a certain amount of obtuseness to Cunniff upon seeing his employers' liability proposal dismantled, it is more plausible that he was quite perspicacious in moving to secure the common law rights of employees regarding on-the-job injuries in the constitution so that they could not be eroded by the courts or the legislature. That he did not mention death actions in his motion may be explained by the fact that such an action had been created by the legislature and should be viewed as within its province to change, but, as long as the statutory action existed, under Proposition 50 the amount of damages recoverable for wrongful death could not be limited to an arbitrary dollar figure. The fact that Cunniff's motion passed without discussion[697] could also be interpreted to mean that the forces led by Baker and

about the similarities or differences between the purposes of the language in Proposition 50 and Section 6 of Article XVIII. If it does say anything, it would appear to say that the purposes of the two are different, otherwise, there would be no need to put the same matter into the constitution twice.

691. *See supra* text accompanying note 560.

692. *Id.*

693. *Id.*

694. *See supra* text accompanying note 566.

695. *See supra* text accompanying note 561.

696. As explained in one of the earliest cases to construe the employer liability provisions in the Arizona Constitution, these provisions were designed to provide an employee with several options:

> Under the laws of Arizona, an employé who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Sections 4 and 5, art. 18, Constitution. (2) Employers' Liability Law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Section 7, art. 18, Constitution. (3) The Compulsory Compensation Law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Section 8, art. 18, Constitution.

Consol. Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 384, 139 P. 465, 466 (1915).

697. *See supra* text accompanying note 565.

Franklin did not see anything untoward in guaranteeing to employees the common law right of action against employers for on-the-job injuries. In any event, it is submitted that this explanation of the framers' intent with regard to Section 6[698] of Article XVIII finds far more support in the events leading up to and occurring during the convention than an explanation that deprives Section 31 of Article II of any meaning at all.[699]

VI. CONCLUSION

Had the Arizona courts in addressing the reach of Section 6 of Article XVIII started with a question rather than the answer, would it, as Justice Frankfurter suggested,[700] have made a difference in the reach ascribed to it? Although one can not be absolutely certain at this point, there clearly is a strong case to be made that Article XVIII was only intended to govern employment

698. If Section 6 of Article XVIII, which does not explicitly refer to employment situations, nevertheless is to be interpreted as applying only to causes of action by employees against employers, what of Section 5 of Article XVIII? Section 5 likewise does not explicitly refer to employment situations but merely states that "[t]he defense of contributory negligence or of assumption of the risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." *Supra* text accompanying note 605. It is submitted that all the evidence regarding the actions of the delegates on the floor of the convention on the morning of December 5, 1910 also supports an interpretation that would limit this provision to employment situations even though there is no explicit reference. *See supra* text accompanying notes 529–67. It makes perfect sense to read Section 5 as saying that, in all cases involving the defense of contributory negligence or of assumption of the risk in an action by an employee against an employer, the court may not rule as a matter of law in favor of the employer. Rather the issue is to be treated as one involving a question of fact and shall be submitted to the jury.

Courts around the turn of the century were still very distrustful of what they considered to be plaintiff-minded jurors. In an effort to control what they perceived to be a bias, if not prejudice, the courts often, particularly in cases brought by employees against their employers for injuries from on-the-job accidents, ruled as a matter of law that the employees were guilty of contributory negligence or assumption of the risk. *See* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946). Thus, it does no violence to the language of Section 5 when it is read in the context of an article entitled "Labor" to say that its purpose is to eliminate such practices by the courts in employment situations.

In addition, too much should not be made of the fact that there is no explicit reference to employment situations in either Section 5 or 6 because not all of the sections in Proposition 88 as originally introduced contained such references, *see supra* text accompanying note 453, and it clearly was intended to apply only to actions by employees against their employers. Moreover, an examination of Article XVIII as it was adopted, *see supra* text accompanying note 566, reveals that the other eight sections, all of which explicitly refer to employment situations could not have been drafted without such references. It would not be possible to talk about an eight hour work day, child labor, employee waivers of tort rights, the fellow servant doctrine, an employers' liability law, a workers' compensation law, a "black list" utilized by employers, or alien labor without explicitly referring in some manner to the subject of employment.

Finally, the fact that Oklahoma has not limited its constitutional counterparts to Section 5 and Section 6 of Article XVIII to employment situations, *see* Chicago, R.I. & P.R. Co. v. Beatty, 116 P. 171 (Okla. 1911) (construing Article 23, Section 6 of the Oklahoma Constitution, the counterpart to Article XVIII, Section 5 of the Arizona Constitution); F.W. Woolworth Co. v. Todd, 231 P.2d 681 (Okla. 1951) (construing Article 23, Section 7 of the Oklahoma Constitution, the counterpart to Article XVIII, Section 6 of the Arizona Constitution), is not very meaningful since the delegates involved in fashioning the Arizona provisions clearly were limiting their attention to the subject of employers' liability when they borrowed the language from the Oklahoma Constitution. *See supra* text accompanying notes 529–67.

699. *See supra* note 688.

700. *See supra* text accompanying note 625.

situations and that Section 6 of this article was never intended to apply generally. On the other hand, were the courts, after thoroughly examining the issue, to say otherwise, as they in fact have said,[701] at the very least we might well have had an explanation much sooner than seventy some odd years after the pertinent events transpired at the constitutional convention. A more timely explanation might have uncovered information, that in the meantime could have disappeared from view, to justify such a holding. As it is, however, the failure to ask the question at the earliest opportunity appears indeed to have made a great deal of difference because there does not appear on the basis of the evidence available today to be any real justification for holding that the guarantees under Section 6 of Article XVIII were ever intended for "the benefit of all."[702]

On another level, if the courts had held that Section 6 of Article XVIII only applies to employment cases, would such a holding alter the results in any of the non-employment cases in which Section 6 has been utilized to invalidate legislation that curtails the rights of claimants under tort law? It is doubtful that the results of any of the decisions by the Supreme Court of Arizona interpreting the constitutionality of various legislative actions under Section 6 of Article XVIII would be altered in the absence of the applicability of this provision. The inapplicability of Section 6 of Article XVIII does not leave the subject of tort reform to the whim or caprice of the legislature. There is substantial protection for the victims of accidents under the Due Process[703] and Equal Protection[704] Clauses of the Arizona Constitution. For example, regardless of the standard of review employed under the Equal Protection Clause of the Arizona Constitution,[705] surely it would be a violation of that clause for the legislature to adopt a statute of limitation that would bar a minor's cause of action for medical malpractice before it could be brought,[706] which was the effect of the legislation

701. *See* Kenyon v. Hammer, 142 Ariz. 69, 688 P.2d 961 (1984); Barrio v. San Manuel Div. Hosp. for Magma Copper Co., 143 Ariz. 101, 692 P.2d 280 (1984).

702. *See supra* text accompanying note 642.

703. *See* ARIZ. CONST. art. II, § 4.

704. *See id.*, § 13.

705. The three standards of review—rational basis, means-scrutiny, and strict scrutiny—most often employed to determine whether legislative classifications violate equal protection clauses are summarized in *Kenyon*, 142 Ariz. at 78, 688 P.2d at 970.

The rational basis test allows the greatest leeway to the legislature; it upholds legislative regulations which impose burdens on one class but not another so long as (1) the court can find some legitimate state interest to be served by the legislation and (2) the facts permit the court to conclude that the legislative classification rationally furthers the state's legitimate interest. Under this test the constitutional requirement of equal protection is violated only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. In applying this test, the courts accept the legislative determination of relevancy so long as it is reasonable, even though it may be disputed, debatable, or opposed by strong contrary arguments. *Id.*

To uphold a statute under the means-scrutiny analysis, the court must find the state's interest to be important and the means adopted to serve that interest to be reasonable, not arbitrary, and fairly and substantially related to the object of the legislation so that all persons in similar circumstances shall be treated alike. In applying this intermediate test, courts must examine more carefully the factual assumptions that underlie the asserted connection between the means adopted by the legislature and the goals which it seeks to achieve. *Id.*

Under the strict scrutiny test a discriminatory statute may be upheld only if there is a compelling state interest to be served and the regulation is necessary to achieve the legislative objective. *Id.*

706. *See, e.g.*, Clark v. Singer, 298 S.E.2d 484 (Ga. 1983) (holding medical malpractice wrongful death statute of limitation that would bar cause of action before it arises unconstitutional under a rational basis test); Carson v. Maurer, 424 A.2d 825 (N.H. 1980)

challenged and held unconstitutional under Section 6 of Article XVIII in *Kenyon v. Hammer*.[707] On the other hand, it may not be unconstitutional for the legislature to adopt a statute of repose for product liability cases that would operate to preclude any action being filed after a sufficient amount of time has elapsed from the date of sale of the product, as the Supreme Court of Arizona held in *Byrant v. Continental Conveyor Equipment Co.*[708] Thus, the fact that Section 6 of Article XVIII would not be available to challenge legislative actions regarding tort reform except in employment cases does not unduly tip the balance of power in favor of the legislature. Moreover, this more traditional allocation of powers between the courts and the legislature through the Due Process and Equal Protection Clauses is far more salutary than a position that ostensibly permits the courts to make-up all the tort law they want without the elected representatives in the legislature having any say about it.

Finally, the more narrow construction of Section 6 of Article XVIII advanced above would avoid some rather anomalous issues that have arisen under the broader construction that the provision applies to non-employment as well employment cases. For example, the issue has arisen as to whether Section 6 of Article XVIII and Section 31 of Article II apply only to those common law actions in tort that existed in 1912 at the time the Arizona Constitution went into effect or whether they also apply to causes of action recognized by the courts since that date.[709] This would not be much of an issue if Section 6 of Article XVIII were to apply only to employee causes of action against employers for on-the-job accidents because the common law has not changed, nor is it likely that any new causes of action will be recognized in the future, with regard to bodily injury in these types of cases. In any event, the current holdings by the Arizona courts that Section 6 of Article XVIII only applies to the law that existed in 1912[710] would make more sense if this section were construed to cover only those employee actions against employers for bodily harm arising from on-the-job accidents. The provisions of Article XVIII were all clearly aimed at redressing the imbalance that had arisen between employees and employers under the law at that time.[711] On the other hand, insofar as Section 31 of Article II is concerned, it is clear that the drafters of the constitution intended for this provision to apply to all types of cases involving bodily injury or death.[712] It would make imminent sense to construe this provision to mean that as long as a cause of action for bodily injury or wrongful death exists that the legislature may not arbitrarily limit the amount of damages recoverable under those actions[713]

(holding medical malpractice statute of limitation that would bar cause of action before it could be brought unconstitutional under a means-scrutiny test); White v. Montana, 661 P.2d 1272 (Mont. 1983) (holding statute that limited compensable components of injury in actions against governmental entities unconstitutional under strict scrutiny test).

707. 142 Ariz. 69, 688 P.2d 961 (1984).

708. 156 Ariz. 193, 751 P.2d 509 (1988) (holding that a 12 year statute of repose running from date that product was first sold for use or consumption does not violate the Due Process Clause or Equal Protection Clause, nor does it violate Section 6 of Article XVIII, of the Arizona Constitution).

709. *See supra* note 631.

710. *Id.*

711. *See supra* text accompanying notes 189, 201–07, 249–60; Malone, *supra* note 698.

712. *See supra* text accompanying notes 630–32.

713. In fact, the Supreme Court of Arizona took the position advanced in the text, at least as to wrongful death actions, in Halenar v. Super. Ct., 109 Ariz. 27, 504 P.2d 928 (1972), when it held:

and that Section 31 of Article II applies to all such causes of action whether existing in 1912 or recognized since that time. If the legislature attempts to abolish the cause of action, rather than limit damages, the validity of that legislative action will be governed by the Due Process and Equal Protection Clauses of the Arizona Constitution unless it involves on-the-job accidents. It is submitted that this construction of Section 6 of Article XVIII and Section 31 of Article II not only is supported by the historical facts, but construes them in such a way so that each complements, rather than overlaps, the other.

In conclusion, it is submitted that it would make for a better balance of power between the courts and the legislature to return to what appears to be the intent of the drafters of the Arizona Constitution with regard to Section 6 of Article XVIII and Section 31 of Article II, as suggested in this Article. The evidence certainly supports such a position. Be that as it may, at the very least, perhaps a corollary should be added to Justice Frankfurter's admonition that it can make a great deal of difference in construing a statute, and in our case the constitution, whether one starts with the answer or with a question. That corollary is this: You might as well start with the question because sooner or later someone is sure to pose it and it will have to be answered eventually.

> The right to recover damages for wrongful death being statutory is not placed beyond the power of the legislature to abrogate by § 6 of Article 18 of the Arizona Constitution. It can be granted or withheld at the pleasure of the legislature. But if the right to sue is granted, by § 31 of Article 2 the legislature cannot place a limitation upon the recovery such as is found in the Workmen's Compensation Act.

Id. at 29, 504 P.2d at 930. The interpretation advanced in the text would not mean, however, that the legislature could not substitute a reasonable compensation system, for example a no-fault insurance system for auto accidents, for certain types of tort actions as long as there were no other constitutional impediments.