

Arizona Employers' Liability Cases

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Arizona Employers' Liability Cases - 250 U.S. 400 (1919)

U.S. Supreme Court Arizona Employers' Liability Cases, 250 U.S. 400 (1919)

Arizona Employers' Liability Cases *

Nos. 20, 21, 232, 332, 334

Argued January 25, 28, 1918

April 24, 25, 119

Decided June 9, 1919

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ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF ARIZONA AND TO THE

SYLLABUS

The Arizona Employers' Liability Law (Rev.Stats., 1913, pars. 3154, 3156, 3158, 3160), in respect of certain specified employments reasonably designated as inherently hazardous and dangerous to workmen, imposes upon the employer, without regard to his fault or that of any person for whose conduct he is responsible, liability in compensatory (not speculative or punitive) damages for the accidental personal injury or death of any employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, but not caused by the employee's own negligence. *Held* that it does not infringe the rights of employers under the Fourteenth Amendment. Pp. [250 U. S. 419](#) *et seq.* *New York Central R. Co. v. White*, [243 U. S. 188](#) .

The states are left a wide field of discretion to change their laws, and their legislation is not subject to constitutional objection upon the ground that it is novel and unwise. Pp. [250 U. S. 419](#) -421.

The court has repeatedly adjudged that the rules governing the liability of employers for death or injury of employees in the course of the employment are subject, as rules of future conduct, to alteration by the states, and that, excluding unreasonable or arbitrary changes, the employer may be made liable without fault, and the common law defenses be abolished. P. [250 U. S. 419](#) .

In this instance, the effect of the statute is to require the employer, instead of the employee, to assume a pecuniary risk inherent in the

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employment and due to its conditions, and not to the negligence of the employee killed or injured, leaving the employer, as the common law in theory left the employee, to take such risk into consideration in fixing wages, with the opportunity, besides, to charge the loss as a part of the cost of the product of the industry. P. [250 U. S. 420](#) .

The statute limits recovery strictly to compensatory damages -- excluding punitive damages, which it may be conceded would be contrary to natural justice -- and makes only such discrimination between employer and employee as necessarily arises from their different relations to the common undertaking. There is no denial of the equal protection of the laws. P. [250 U. S. 422](#) .

The statute adds no new burden to the cost of industry, but merely recognizes and in part transfers to the employer an existing and inevitable burden due to the hazardous nature of the industry. P. [250 U. S. 424](#) .

The statute may be regarded as a police regulation, designed to prevent the injured employees and their dependents from becoming a burden upon the public, and, so regarded, it cannot be said to be so clearly unreasonable and arbitrary that this Court should declare it violative of the Fourteenth Amendment. *Id.*

It amounts to a contradiction of terms to say that, in leaving the issues of fact and the compensatory damages to be determined by juries according to the established procedure of the courts, the statute violates due process of law. P. [250 U. S. 426](#) .

If a state establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law or according to some prescribed scale reasonably adapted to produce a fair result is for the state to determine. P. [250 U. S. 428](#) .

Whether such compensation should be paid in a single sum or distributed during the period of disability or need is likewise for the state to determine. P. [250 U. S. 429](#) .

The objection that the Arizona act may be extended by construction to nonhazardous industries cannot be raised by parties whose industries were indisputably hazardous. *Id.*

The objection that the benefits of the act may be extended, in the case of a death claim, to those not nearly related to or dependent upon the workman, or may even go by escheat to the state, *held* not presented, the Arizona court having construed the act as confining recovery to compensatory damages. P. [250 U. S. 430](#) .

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The Arizona system allows the injured employee an election of remedies, permitting restricted recovery under a "compensation law " although he has been guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act if he has not. *Held* not inconsistent with the due process or equal protection clauses, as respects employers. P. [250 U. S. 430](#) .

CONCURRING OPINION OF HOLMES, J.

That certain voluntary conduct may constitutionally be put at the peril of those pursuing it finds illustrations in the criminal law and in the extent to which a master may be held for acts of a servant. P. [250 U. S. 432](#) .

The criterion of fault itself involves applying the external standard of prudence and the decision of a jury. *Id.*

Holding the employer liable for accidents tends directly to secure attention to the safety of the men, an unquestionably constitutional object of legislation. *Id.*

In allowing damages for pain and mutilation, the Arizona law constitutionally may have been based on the view that, if a business is unsuccessful ,it means that the public does not care enough for it to make it pay, and, if it is successful, the public pays the expenses, and something more, and should pay, as part of the cost of producing what it wants, the cost of pain and mutilation incident to the production, and that, by throwing that loss upon the employer in the first instance, it is thrown in the long run, justly, upon the public. P. [250 U. S. 433](#) .

The liability under this law is limited to a conscientious valuation of the loss, and it is to be presumed that juries and courts will confine it accordingly. *Id.*

It is not urged in this case that the provision for 12 percent interest from the date of suit, in case of an unsuccessful appeal, is void. P. [250 U. S. 434](#) .

19 Ariz. 151, *id.* 182, affirmed.

The cases are stated in the opinion.

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MR. JUSTICE PITNEY delivered the opinion of the Court.

In each of these cases, a workman in a hazardous industry in the State of Arizona, having received in the course of his employment a personal injury through an accident due to a condition or conditions of the occupation not caused by his own negligence or, so far as appears, by that of his employer or others, brought action under the Employers' Liability Law of Arizona and recovered compensatory damages against the employer ascertained upon a consideration of the nature, extent, and disabling effects of the injury in each particular case. And the question is raised whether the statute referred to, as applied to the facts of these cases, is repugnant to that provision of the Fourteenth Amendment which declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Article XVIII of the Constitution of the State of Arizona is entitled "Labor," and contains, among others, the following sections:

"SECTION 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant 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 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 employers' liability

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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 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 workmen 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 [law?] 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."

Pursuant to 7, the Employers' Liability Law was enacted (c. 89, Laws 1912, Reg.Sess.; Arizona Rev.Stats. 1913, pars. 3153-3162); pursuant to 8 a Workmen's

Compulsory Compensation Law was enacted (c. 14, Laws 1912, 1st Spec.Sess.; Arizona Rev.Stats. 1913, pars. 3163 *et seq.*).

In two of the present cases, the former law was sustained by the Supreme Court of Arizona against attacks based upon the Fourteenth Amendment. *Inspiration Consol. Copper Co. v. Mendez*, 19 Ariz. 151; *Superior &*

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Pittsburg Copper Co. v. Tomich, 19 Ariz. 182. In the other three cases, it was sustained by the United States district court for that district. And the resulting judgments in favor of the injured workmen are brought under our review by writs of error.

Some of the arguments submitted to us assail the wisdom and policy of the act because of its novelty, because of its one-sided effect in depriving the employer of defenses while giving him (as is said) nothing in return, leaving the damages unlimited, and giving to the employee the option of several remedies, as tending not to obviate but to promote litigation, and as pregnant with danger to the industries of the state. With such considerations this Court cannot concern itself. Novelty is not a constitutional objection, since under constitutional forms of government each state may have a legislative body endowed with authority to change the law. In what respects it shall be changed, and to what extent, is in the main confided to the several states, and it is to be presumed that their legislatures, being chosen by the people, understand and correctly appreciate their needs. The states are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment, and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

We have been called upon recently to deal with various forms of workmen's compensation and employers' liability statutes. *Second Employers' Liability Cases*, [223 U. S. 1](#) , [223 U. S. 47](#) -53; *New York Central R. Co. v. White*, [243 U. S. 188](#) , [243 U. S. 196](#) *et seq.*; *Hawkins v. Bleakly*, [243 U. S. 210](#) ; *Mountain Timber Co. v. Washington*, [243 U. S. 219](#) ; *Middleton v. Texas Power & Light*

Co., [249 U. S. 152](#) . These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of the employment are not beyond alteration by legislation in

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the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit, and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change.

The principal contention is that the Arizona Employers' Liability Law deprives the employer of property without due process of law, and denies to him the equal protection of the laws, because it imposes a liability without fault, and, as is said, without equivalent protection. The statute, in respect of certain specified employments designated as inherently hazardous and dangerous to workmen -- and reasonably so described -- imposes upon the employer, without regard to the question of his fault or that of any person for whose conduct he is responsible, a liability in compensatory damages, excluding all such as are speculative or punitive (*Arizona Copper Co. v. Burciaga*, 177 P. 29), for accidental personal injury or death of an employee arising out of and in the course of the employment and due to a condition or conditions of the occupation, in cases where such injury or death of the employee shall not have been caused by his own negligence. This is the substance of pars. 3154 and 3158, and they are to be read in connection with par. 3156, which declares what occupations are hazardous within the meaning of the law. By par. 3160, contracts and regulations exempting the employer from liability are declared to be void.

In effect, the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee attributable to hazards inherent in the employment and due to its conditions and not to the negligence of

the employee killed or injured. In determining

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whether this departure from the previous rule is so arbitrary or inconsistent with the fundamental rights of the employer as to render the law repugnant to the Fourteenth Amendment, it is to be borne in mind that the matter of the assumption of the risks of employment and the consequences to flow therefrom has been regulated time out of mind by the common law, with occasional statutory modifications. The rule existing in the absence of statute, as usually enunciated, is that all consequences of risks inherent in the occupation and normally incident to it are assumed by the employee, and afford no ground of action by him or those claiming under him in the absence of negligence by the employer, and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise or reparation, the common law brings into play a new set of regulations requiring the employer to assume the risk under certain circumstances, the employee under others. *Seaboard Air Line v. Horton*, [233 U. S. 492](#) , [233 U. S. 504](#) -505; s.c., [239 U. S. 239](#) U.S. 595, [239 U. S. 598](#) -599, and cases cited.

But these are no more than rules of law, deduced by the courts as reasonable and just, under the conditions of our civilization, in view of the relations existing between employer and employee in the absence of legislation. They are not placed by the Fourteenth Amendment beyond the reach of the state's power to alter them, as rules of future conduct and tests of responsibility, through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably, and in

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defiance of natural justice, with the right of employers and employees to agree between themselves respecting the terms and conditions of employment.

We are unable to say that the Employers' Liability Law of Arizona, in requiring the employer in hazardous industries to assume, so far as pecuniary consequences go, the entire risk of injury to the employee attributable to accidents arising in the course of the employment and due to its inherent conditions, exceeds the bounds of permissible legislation or interferes with the constitutional rights of the employer. The answer that the common law makes to the hardship of requiring the employee to assume all consequences, both personal and pecuniary, of injuries arising out of the ordinary dangers of the occupation is that the parties enter into the contract of employment with these risks in view, and that the consequences ought to be, and presumably are, taken into consideration in fixing the rate of wages. *Chicago, Milwaukee R. Co. v. Ross*, [112 U. S. 377](#) , [112 U. S. 383](#) ; *Northern Pacific R. Co. v. Herbert*, [116 U. S. 642](#) , [116 U. S. 647](#) ; *New York Central R. Co. v. White*, [243 U. S. 188](#) , [243 U. S. 199](#) ; *Farwell v. Boston & Worcester R. Co. Corp.*, 4 Metc. 49, 57. In like manner, the employer, if required -- as he is by this statute in some occupations -- to assume the pecuniary loss arising from such injury to the employee, may take this into consideration in fixing the rate of wages, besides which he has an opportunity, which the employee has not, to charge the loss as a part of the cost of the product of the industry.

There is no question here of punishing one who is without fault. That, we may concede, would be contrary to natural justice. But, as we have seen, the statute limits the recovery strictly to compensatory damages. And there is no discrimination between employer and employee except such as necessarily arises from their different relation to the common undertaking. Both are essential

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to it, the one to furnish capital, organization, and guidance, the other to perform the manual work; both foresee that the occupation is of such a nature, and its conditions such, that sooner or later some of the workmen will be physically injured or maimed, occasionally one killed, without particular fault on anybody's

part. See 243 U.S. [243 U. S. 203](#) . The statute requires that compensation shall be paid to the injured workman or his dependents because it is upon them that the first brunt of the loss falls, and that it shall be paid by the employer because he takes the gross receipts of the common enterprise, and, by reason of his position of control, can make such adjustments as ought to be and practically can be made in the way of reducing wages and increasing the selling price of the product in order to allow for the statutory liability. There could be no more rational basis for a discrimination, and it is clear that in this there is no denial of the "equal protection of the laws."

Under the "due process" clause, the ultimate contention is that men have an indefeasible right to employ their fellow men to work under conditions where, as all parties know, from time to time some of the workmen inevitably will be killed or injured, but where nobody knows or can know in advance which particular men or how many will be the victims, or how serious will be the injuries, and hence no adequate compensation can be included in the wages, and to employ them thus with the legitimate object of making a profit above their wages if all goes well, but with immunity from particular loss if things go badly with the workmen through no fault of their own, and they suffer physical injury or death in the course of their employment. In view of the subject matter and of the public interest involved, we cannot assent to the proposition that the rights of life, liberty, and property guaranteed by the Fourteenth Amendment prevent the states from modifying that rule of the common law

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which requires or permits the workingman to take the chances in such a lottery.

The act -- assuming, as we must, that it be justly administered -- adds no new burden of cost to industry, although it does bring to light a burden that previously existed, but perhaps was unrecognized, by requiring that its cost be taken into the reckoning. The burden is due to the hazardous nature of the industry, and is inevitable if the work of the world is to go forward. What the act does is merely to require that it shall be assumed, to the extent of a pecuniary equivalent of the

actual and proximate damage sustained by the workman or those near to him, by the employer -- by him who organizes the enterprise, hires the workmen, fixes the wages, sets a price upon the product, pays the costs, and takes for his reward the net profits, if any.

The interest of the state is obvious. We declared in the *White* case, (243 U.S. [243 U. S. 207](#)):

"It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be 'natural and inalienable,' and the authority to prohibit contracts made in derogation of a lawfully established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear. . . . This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those

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concerned that they properly may be regarded as coming within the category of police regulations."

(Citing cases.)

And in *Mountain Timber Co. v. Washington*, [243 U. S. 219](#) , [243 U. S. 239](#) , it was said:

"Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern."

Having this interest, the State of Arizona reasonably might say:

"The rule of the common law requiring the employee to assume all consequences of personal injuries arising out of the ordinary dangers and normal conditions of a hazardous occupation, and to secure his indemnity in advance in the form of increased wages, is incompatible with the public interest because, assuming that workmen are on an equality with employers in a negotiation about the rate of wages, the probability of injury's occurring to a particular employee, and the nature and extent of such injury, are so contingent and speculative that it is impracticable for either employer or employee approximately to estimate in advance how much allowance should be made for them in the wages, and even were a proper allowance made, experience demonstrates that, under our conditions of life, it is not to be expected that the average workingman will set aside out of his wages a proper insurance against the time when he may be injured or killed. Hence, recognizing that injuries to workmen constitute a part of the unavoidable cost of hazardous industries, we will require that it be assumed by the one in control of the industry as employer, just as he pays other items of cost, so that he shall not take a profit from the labor of his employees while leaving the injured ones and the dependents of those whose lives are lost through accidents due to the conditions of the occupation to be a burden upon the public."

Whether this or similar reasoning was employed we

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have no means of knowing; whether, if employed, it ought to have been accepted as convincing is not for us to decide. It being incumbent upon the opponents of the law to demonstrate that it is clearly unreasonable and arbitrary, it is sufficient for us to declare, as we do, that such reasoning would be pertinent to the subject, and not so unfounded or irrational as to permit us to say that the state, if it accepted it as a basis for changing the law in a matter so closely related to the public welfare, exceeded the restrictions placed upon its action by the Fourteenth Amendment.

It is objected that the responsibility of the employer under this statute is unlimited; but this is not true except as it is true of every action for compensatory damages where the amount awarded varies in accordance with the nature and extent of the damages for which compensation is made. It is said that, in actions by employees against employers, juries are prone to render extravagant verdicts. The same thing has been said, and with equal reason, concerning actions brought by individuals against railroad companies, traction companies, and other corporations. In this as in other cases, there is a corrective in the authority of the court to set aside an exorbitant verdict. And it amounts to a contradiction of terms to say that, in submitting a controversy between litigants to the established courts, there to be tried according to long established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages, there is a denial of "due process of law."

Much stress is laid upon that part of our opinion in the *White* case, where, after citing numerous previous decisions upholding the authority of the states to establish by legislation departures from the fellow servant rule and other common law rules affecting the employer's liability for personal injuries to the employee, we said (243 U.S. [243 U. S. 201](#)):

"It is true that, in the case of the statutes thus

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sustained, there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common law rules respecting liability as between employer and employee without providing a reasonably just substitute. . . . No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place,"

etc.

In spite of our declaration that no opinion was intimated, this is treated as an intimation that a statute such as the one now under consideration, creating a new and additional right of action and allowing no defense (if the conditions of liability be shown) unless the accident was caused by the negligence of the injured employee, would be regarded as in conflict with the due process clause. We cannot, however regard this statute as anything else than a substitute for the law as it previously stood; whether it be a proper substitute was for the people of the State of Arizona to determine; but we find no ground for declaring that they have acted so arbitrarily, unreasonably, and unjustly as to render their action void. They have resolved that the consequences of a personal injury to an employee attributable to the inherent dangers of the occupation shall be assumed not wholly by the particular employee upon whom the personal injury happens to fall, but, to the extent of a compensation in money awarded in a judicial tribunal according to the ordinary processes of law, shall be assumed by the employer, leaving the latter to charge it up, so far as he can, as a part of the cost of his product, just as he would charge a loss by fire, by theft, by bad debts, or any other usual loss of the business, and to make allowance for it, so far as he can, in a reduced scale of wages. And they have come to this resolution, we repeat, not in a matter of indifference

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or upon a question of mere economics, but in the course of regulating the conduct of those hazardous industries in which human beings -- their own people -- in the pursuit of a livelihood must expose themselves to death or to physical injuries more or less disabling, with consequent impoverishment, partial or total, of the workman or those dependent upon him. The statute says to the employer, in effect:

"You shall not employ your fellow men in a hazardous occupation for gain, you being in a position to reap a reward in money through selling the product of their toil, unless you come under an obligation to make appropriate compensation in money in case of their death or injury due to the conditions of the occupation."

The rule being based upon reasonable grounds affecting the public interest, being established in advance and applicable to all alike under similar circumstances, there is, in our opinion, no infringement of the fundamental rights protected by the Fourteenth Amendment.

Some expressions contained in our opinion in the *White* case ([243 U. S. 243](#) U.S. 203, [243 U. S. 204](#) -205) are treated in argument as if they were equivalent to saying that, if a state, in making a legislative adjustment of employers' liability, departs from the common law system of basing responsibility upon fault, it must confine itself to a limited compensation, measured and ascertained according to the methods adopted in the compensation acts of the present day. Of course, nothing of the kind was intended. In a previous part of the opinion (pp. [243 U. S. 196](#) -200), it had been shown that the employer had no constitutional right to continued immunity from liability in the absence of negligence, nor to have the fellow servant rule and the rules respecting contributory negligence and assumption of risk remain unchanged. The statutory plan of compensation for injured workmen and the dependents of those fatally injured -- an additional feature at variance with the common law -- was then upheld, but, of course, without

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saying that no other would be constitutional. For if, as we held in that case, the novel statutory scheme of awarding compensation according to a prearranged scale is sustainable, it follows, perhaps *a fortiori*, that the Arizona method of ascertaining the compensation according to the facts of each particular case -- substantially the common law method -- is free from objection on constitutional grounds. Indeed, if a state recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale reasonably adapted to produce a fair result, is for the state itself to determine. Whether the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law, just as under the

common law system in the case of a judgment based upon negligence, or whether it would be more prudent to distribute the award by installment payments covering the period of disability or of need, likewise is for the state to determine, and upon this the plaintiffs in error can raise no constitutional question.

To the suggestion that the act now or hereafter may be extended by construction to nonhazardous occupations, it may be replied first that the occupations in which these actions arose were indisputably hazardous, hence plaintiffs in error have no standing to raise the question (*Plymouth Coal Co. v. Pennsylvania*, [232 U. S. 531](#) , [232 U. S. 544](#) ; *Jeffrey Mfg. Co. v. Blagg*, [235 U. S. 571](#) , [235 U. S. 576](#) ; *Hendrick v. Maryland*, [235 U. S. 610](#) , [235 U. S. 621](#) ; *Middleton v. Texas Power & Light Co.*, [249 U. S. 152](#) , [249 U. S. 157](#)), and secondly, it hardly is necessary to add that employers in nonhazardous industries are in little danger from the act, since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.

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To the objection that the benefits of the act may be extended, in the case of death claims, to those not nearly related to or dependent upon the workman, or even may go by escheat to the state, it is sufficient to say that no such question is involved in these records; in *Arizona Copper Co. v. Burciaga*, 177 P. 29, a case of personal injuries not fatal, the Supreme Court of Arizona interpreted the act as limiting the recovery to compensatory damages; it reasonably may be so construed in its application to death claims, and it would be improper for this Court to assume in advance that the state court will place such a construction upon the statute as to render it obnoxious to the federal Constitution. *Plymouth Coal Co. v. Pennsylvania*, [232 U. S. 531](#) , [232 U. S. 546](#) ; *St. Louis Southwester. Ry. v. Arkansas*, [235 U. S. 350](#) , [235 U. S. 369](#) .

It is insisted that the Arizona system deprives employers of property without due process of law and denies them equal protection because it confers upon the employee a free choice among several remedies. In *Consolidated Arizona*

Smelting Co. v. Ujack, 15 Ariz. 382, 384, the supreme court of the state said:

"Under the laws of Arizona, an employee 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. Const. secs. 4, 5, art. 18. (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. sec. 7, art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const., sec. 8, art. 18."

It is said by counsel that the compensation act, because it limits the recovery,

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never is resorted to in practice unless the employee has been negligent, and hence is debarred of a remedy under the liability act. But it is thoroughly settled by our previous decisions that a state may abolish contributory negligence as a defense, and election of remedies is an option very frequently given by the law to a person entitled to an action; an option normally exercised to his own advantage, as a matter of course.

Other points are suggested, but none requiring particular discussion.

Judgments affirmed.

* The docket titles of these cases are: *Arizona Copper Company, Limited v. Hammer*, No. 20, *Arizona Copper Company, Limited v. Bray*, No. 21, *Ray Consolidated Copper Co. v. Veazey*, No. 232, in error to the District Court of the United States for the District of Arizona; *Inspiration Consolidated Copper Co. v. Mendez*, No. 332, *Superior Pittsburg Copper Co. v. Tomich*, sometimes known as *Thomas*, No. 334, in error to the Supreme Court of the State of Arizona.

MR. JUSTICE HOLMES concurring. *

The plaintiff (the defendant in error) was employed in the defendant's mine, was hurt in the eye in consequence of opening a compressed air valve, and brought the present suit. The injury was found to have been due to risks inherent to the business, and so was within the Employers' Liability Law of Arizona, Rev.Stats.1913, Title 14, c. 6. By that law as construed, the employer is liable to damages for injuries due to such risks in specified hazardous employments when guilty of no negligence. Par. 3158. There was a verdict for the plaintiff, judgment was affirmed by the supreme court of the state, 19 Ariz. 151, and the case comes here on the single question whether, consistently with the Fourteenth Amendment, such liability can be imposed. It is taken to exclude "speculative, exemplary and punitive damages," but to include all loss to the employee caused by the accident, not merely in the way of earning capacity, but of disfigurement and bodily or mental pain. See *Arizona Copper Co. v. Burciaga*, 177 P. 29, 33.

There is some argument made for the general proposition

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that immunity from liability when not in fault is a right inherent in free government and the *obiter dicta* of Mr. Justice Miller in [[Citizen's Savings & Loan Association v. Topeka](#), 20 Wall. 655, are referred to. But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know of nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment, and there is nothing in the Constitution to limit the principle to that instance. *St. Louis & San Francisco Ry. Co. v. Mathews*, [165 U. S. 1](#) , [165 U. S. 22](#) ; *Chicago, Rock Island & Pacific Ry. Co. v. Zerneck*, [183 U. S. 582](#) , [183 U. S. 586](#) ; *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, [210 U. S. 281](#) , [210 U. S. 295](#) . See *Guy v. Donald*, [203 U. S. 399](#) , [203 U. S. 406](#) . There are cases in which even the criminal law requires a man to know facts at his peril. Indeed, the criterion which is thought to be free from constitutional objection, the criterion of fault, is the application of an external standard, the conduct of a prudent man in the known circumstances -- that is, in doubtful cases, the opinion of the jury -- which the defendant has to satisfy at his

peril, and which he may miss after giving the matter his best thought. *The Germanic*, [196 U. S. 589](#) , [196 U. S. 596](#) ; *Nash v. United States*, [229 U. S. 373](#) , [229 U. S. 377](#) ; *Eastern states Retail Lumber Dealers' Association v. McBride*, [234 U. S. 600](#) , [234 U. S. 610](#) ; *Miller v. Strahl*, [239 U. S. 426](#) , [239 U. S. 434](#) . Without further amplification, so much may be taken to be established by the decisions. *New York Central R. Co. v. White*, [243 U. S. 188](#) , [243 U. S. 198](#) , [243 U. S. 204](#) ; *Mountain Timber Co. v. Washington*, [243 U. S. 219](#) , [243 U. S. 236](#) .

I do not perceive how the validity of the law is affected by the fact that the employee is a party to the venture. There is no more certain way of securing attention to the safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable

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for accidents. Like the crimes to which I have referred, they probably will happen a good deal less often when the employer knows that he must answer for them if they do. I pass, therefore, to the other objection urged and most strongly pressed. It is that the damages are governed by the rules governing in action of tort -- that is, as we have said, that they may include disfigurement and bodily or mental pain. Natural observations are made on the tendency of juries when such elements are allowed. But if it is proper to allow them, of course, no objection can be founded on the supposed foibles of the tribunal that the Constitution of the United States and the states have established. Why, then, is it not proper to allow them? It is said that the pain cannot be shifted to another. Neither can the loss of a leg. But one can be paid for as well as the other. It is said that these elements do not constitute an economic loss, in the sense of diminished power to produce. They may. *Ball v. William Hunt & Sons, Ltd.*, [1912] A.C. 496. But whether they do or not they are as much part of the workman's loss as the loss of a limb. The legislature may have reasoned thus. If a business is unsuccessful, it means that the public does not care enough for it to make it pay. If it is successful the public pays its expenses and something more. It is reasonable that the public should pay the whole cost of producing what it wants, and a part of that cost is the pain and mutilation incident

to production. By throwing that loss upon the employer in the first instance, we throw it upon the public in the long run, and that is just. If a legislature should reason in this way and act accordingly, it seems to me that it is within Constitutional bounds. *Matter of Erickson v. Preuss*, 223 N.Y. 365. It is said that the liability is unlimited, but this is not true. It is limited to a conscientious valuation of the loss suffered. Apart from the control exercised by the judge, it is to be hoped that juries would realize that unreasonable verdicts would tend to

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make the business impossible, and thus to injure those whom they might wish to help. But, whatever they may do, we must accept the tribunal, as I have said, and are bound to assume that they will act rightly and confine themselves to the proper scope of the law.

It is not urged that the provision allowing twelve percent interest on the amount of the judgment from the date of filing the suit, in case of an unsuccessful appeal, is void. *Fidelity Mutual Life Association v. Mettler*, [185 U. S. 308](#) , [185 U. S. 325](#) - 327; *Consaul v. Cummings*, [222 U. S. 262](#) , [222 U. S. 272](#) .

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE concur in this statement of additional reasons that lead me to agree with the opinion just delivered by my Brother PITNEY.

* This concurrence is in case No. 332, *Inspiration Consol. Copper Co. v. Mendez*.

MR. JUSTICE Mc KENNA dissenting.

I find myself unable to concur, yet reluctant to dissent. The case is of the kind that, once pronounced, will be a rule in like or cognate cases forever -- indeed, may even be extended. It is said to rest on the cases sustaining the workmen's compensation law of New York, [243 U. S. 203](#) , and its associated cases in the same volume upholding like laws of other states. The present case certainly comes after those cases and has that symptom of being their sequence. They cannot be said to have been easy of judgment against the contentions and

conservatism which opposed them, and there was, at least to me, no prophecy of their extent, and therefore to me the present case is a step beyond them. I hope it is something more than timidity, dread of the new, that makes me fear that it is a step from the deck to the sea -- the metaphor suggests a peril in the consequences.

But let me in a more concrete way make application of this comment. I may assume that the purpose and principle and general extent of workmen's compensation laws

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are known. I must rest on that assumption, for even an epitome of them or the reasons for them would unduly extend this dissent. The Arizona law has no resemblance to them. It is a direct charge of liability upon the employer for death or injury incurred in his employment, he being without fault. Its remedies are the ordinary legal remedies; its measure of relief, however, has in it something more than the ordinary measures of relief, certainly not those of the compensation laws, nor is it as considerate and guarded as they. If its validity therefore can be deduced from the cases explanatory of those laws, it can only be done by bringing its instances and theirs under the same generalization -- that is, that it is competent for government to charge liability and exempt from responsibility according as one is employer or employee, there being no other circumstance than that relation. Of this there can be no disguise. It may be confused by argument and attempt at historical analogies and deductions, but to that comprehensive principle the case must come at last. All else is adventitious, and puts out of view the relation of the factors of production. It puts out of view that employers are as necessary to production as employees, and subjects to peril the voluntary conduct of the former and leaves out of account as an element the voluntary conduct of the latter. In other words, there is a clear discrimination, a class distinction, with its legal circumstances, and, I may say, invidious circumstances, in view of some of the reasons adduced in its justification. And these effects cannot be concealed under any camouflage, nor given the plausible and attractive gloss of public policy, justified by the different conditions of employer

and employee. Unquestionably there is a difference -- it constitutes the life of the relation. But the question is: who shall compensate the injury that may result from the relation, voluntarily assumed by both, urged by their respective interests and a calculation of advantage?

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But I pass this discrimination and return to the law as a violation of the employer's rights, considered absolutely and abstractly. It seems to me to be of the very foundation of right -- of the essence of liberty as it is of morals -- to be free from liability if one is free from fault. It has heretofore been the sense of the law and the sense of the world, pervading the regulations of both, that there can be no punishment where there is no blame, and yet the court now, by its decision, erects the denial of these postulates of conduct into a principle of law and governmental policy. In other words, it is said to be a benefit to government to put the exact discharge of duty under the menace of penalty and invert the conceptions of mankind of the relation of right and wrong action. If the legislation does not punish without fault, what does it do? The question is pertinent. Consider what the employer does: he invests his money in productive enterprise mining, smelting, manufacturing, railroading -- he engaged employees at their request and pays them the wages they demand; he takes all of the risks of the adventure. Now there is put upon him an immeasurable element that may make disaster inevitable. I find it difficult to answer the argument advanced to support or palliate this effect, or, independently of it, to justify the interference with rights. It is a certain impeachment of some rights to assume that they need justification, and a betrayal of them to make them a matter of controversy. There are precepts of constitutional law, as there are precepts of moral law, that reach the conviction of aphorisms and are immediately accepted by all who understand them, and comment is considered as confusing as unnecessary. I say this not in dogmatism, but in expression of my vision of things, and I say it with deference to the contrary judgment of my Brethren of the majority.

Of course, reasons may be found for the violation of rights, advantage to somebody or something in that violation.

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Tyranny even may find pretexts, and seldom boldly bids its will avouch its acts, and certainly there can be no accusation of barefaced power in the Arizona law. Its motives and purposes are worthy, and it requires some resolution of duty to resist them. It must be seen, and is seen, however, that the difference between the position of employer and employee, simply considering the latter as economically weaker, is not a justification for the violation of the rights of the former, and that individual rights cannot be made to yield to philanthropy, and therefore the welfare of the government is brought forward and displayed. The law saves the government, is the comment, from the burden of paupers, its administration and peace from the disturbance of criminals. The answer, I think, is immediate. Government, certainly constitutional government, cannot afford to infringe -- indeed, betrays its purpose if it infringes -- a right of anybody upon money considerations or for ease in the exercise of its faculties.

But, granting there is something in the argument, what shall be the limits of its application? Will it extend the principle of the present case to nonhazardous employments? If not, why not? The Arizona law stops with certain occupations which it calls "hazardous," but it includes in the description "manufacturing," without qualifying words. In the New York compensation law passed on in *New York Central Railroad v. White*, [243 U. S. 203](#) , there were forty-two groups of hazardous occupations. In *Mountain Timber Co. v. Washington*, [243 U. S. 219](#) , the Court had quite a struggle with the provisions of the Washington compensation law, which was so far different from those of the other cases as to incur the dissent of members of the Court. It is now, I think, of pertinent inquiry whether the quality of being hazardous is an inherent and necessary element of legality or a matter of legislative definition and policy. Besides, if there can be

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liability without fault in one occupation, and that can be a principle of legislation, why not in any other? Who is to determine the application, court or legislature? If the latter, a court may not even express apprehension of its exercise, and yet it cannot put out of view the drift of events and, in blind fatalism, await their incidence when called upon to consider the legality of such exercise. We know things are in change -- have changed -- and a mark of it is that the drift of public opinion, and of legislation following opinion, is to alter the relation between employer and employee, and to give to the latter a particular distinction, relieve him from a responsibility which would seem to be, and which until lately it has been, the sense of the world to be, as much upon him as upon his employer, not in dependence, not as a mark of subservience, but as an obligation of his freedom, and therefore, as a consequence, that, where he has liberty of action, he has responsibility for action. In a word, the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions, and from the action of economic forces and their consequences give it immunity from the pitilessness of life. And there are appealing considerations for this drift of opinion, and inevitable sympathy with it, as with many other conditions, but which the law cannot relieve by a sacrifice of constitutional rights. In what legislation the drift (it is persuasion in some) may culminate cannot now be predicted, but it is very certain that, whatever it be, the judgment now delivered will be cited to justify it. Will it not be said that, if one right of an employer can be made to give way, why not another? -- made a condition "upon economic or other grounds" of his enterprise. Indeed, may not the question be made more general, and if in supposed benefit to a particular class, and through benefit to them to the public, there may be constraint upon or the imposition of burden upon one right of a citizen, why not upon another? There is therefore, I

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think, menace in the present judgment to all rights, subjecting them unreservedly to conceptions of public policy. If, however, this general apprehension be not justified, there is threat enough in the judgment of the court to the interest of employers generally as a result of the difference in conditions.

A rather curious argument is used to support the Arizona law. It is said, in justification of its discrimination between employer and employee, that the employer may, in relief from it and rescue from its burdens, pass them to the consumers of his products, as he does or may do in the case of other expenses of his venture, and in the long run their incidence is, as it is said it should be, on the public, and that the legislature, in so considering, was reasoning within constitutional bounds. There is attractive speciousness in the argument. The individual employer seems to be divested of grievance, and the problem the law presents to be one of economics and governmental policy is a kind of taxation, an expense of government, the burden of which is properly laid upon the public, and over which a court can have but limited power.

If it is intended by the argument to express no more than a tendency, while it has no relevancy, I think, upon the validity of the law, there may be no danger in it. If it is intended to be erected into a principle, there is danger in it. It is certainly facile and comprehensive. What burden can be put upon industry or the activities of men that may not be justified by it?

Of course, there will be no production unless all of its costs be reimbursed by the price of the articles produced. And by costs, I mean as well the burdens of government as profit to the employer -- his inducement to enterprise, and the wages of employees -- their inducement to labor. Without such reimbursement, there will be no production, and cannot be beyond a certain extent and for a certain time, and there is no way to effect it but through the consuming

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public. But recourse to such consumption as a rescue from the law is not a justification for the law, and it is very doubtful if it had any conscious influence in the enactment of the law.

Indeed, in the present case, what could have been its influence, and to what extent can it have an ameliorating effect? An employer in the indicated industries can have no relief except in the home market. If his products (where there are

products) go beyond -- go to other states -- they will meet the competition of unburdened products. But this is obvious, and needs no comment.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE Mc REYNOLDS concur in this dissent.

MR. JUSTICE Mc REYNOLDS dissenting.

While I earnestly join in the dissent written by MR. JUSTICE Mc KENNA, it seems not inappropriate to state my own views somewhat more fully. The important and underlying question is common to the five cases. No. 232 is typical, and to detail certain facts and circumstances disclosed by the record therein may aid the discussion.

Basing his claim upon the Arizona Employers' Liability Law, Dan Veazey sued plaintiff in error in the United States district court to recover damages for personal injuries received by him February 10, 1916, while engaged as millwright and carpenter in constructing a "flotation system" at the company's mill or reduction works in Gila County, Arizona, "wherein steam, electricity, or other mechanical power was then and there used to operate machinery." He alleged that, while exercising due care, he

"suffered severe personal and bodily injuries by an accident arising out of and in course of such labor, service, and employment, and due to a condition or conditions of such occupation or employment,"

which injuries were

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not caused by his negligence, but were sustained in the manner following:

"Plaintiff, in the due course of his said labor, service, and employment was standing upon a certain timber or joist incorporated in said 'flotation system,' engaged in bolting and fastening together the timbers thereof. That the said timber or joist upon which plaintiff was then and there standing was then and there

elevated above the ground or floor of said mill or reduction works a distance of approximately ten feet. That, while so engaged as aforesaid, plaintiff slipped from said timber or joist and fell to the ground . . . with great force and violence, . . ."

was permanently injured, and will forever remain sick, sore, lame, and crippled.

No charge of negligence or failure to perform any duty was made against the company. It unsuccessfully set up and relied upon invalidity of the Employers' Liability Law because in conflict with the Fourteenth Amendment; judgment went against it, and the cause is here by writ of error to the trial court. Judicial Code (Act March 3, 1911, c. 231) 237, 36 Stat. 1156.

Article XVIII of the Arizona Constitution provides:

"Section 4. The common law doctrine of fellow servant, so far as it affects the liability of a master for injuries to his servant 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 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 Employers' Liability Law, by the terms of which any employer,

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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 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 law 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."

Obeying the constitutional mandate, the legislature enacted the "Employers' Liability Law," approved May 24, 1912 (c. 89, Laws of Ariz. 1912, p. 491; Rev.Stats. Ariz.1913, pars. 3153-3162), which provides:

That to protect the safety of workmen at manual or mechanical labor in many occupations declared hazardous and enumerated in 4 -- among them all work in or about mines and in mills, shops, plants and factories where steam or electricity is used to operate machinery -- every employer, whether individual, association, or corporation,

"shall be liable for the death or injury, caused by any

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

"Sec. 6. When, in the course of work in any of the employments or occupations enumerated in Sec. 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service, and employment and due to a condition or conditions of such occupation or employment is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee, and, if none, then to such employe's parents, and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative for the benefit of the estate of the deceased."

Section 7 requires that questions of contributory negligence and assumption of risk shall be left to the jury. The full text of the act is in the margin. [[Footnote 1](#)]

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Likewise, the legislature enacted a Compulsory Compensation Law, approved June 8, 1912, applicable to workmen

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in the same occupations as those declared hazardous by the Employers' Liability Law (c, 14, Laws of Ariz.Spec.Sess.1912, p. 23).

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Material portions of it are in the margin. [[Footnote 2](#)]

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In *Consolidated Arizona Smelting Co. v. Ujack*, (1914) 15 Ariz. 382, 384, the supreme court declared:

"Under the laws of Arizona, an employee 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. Const. secs. 4, 5, art. 18; (2) employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const. sec. 7, art. 18; (3) the compulsory compensation law, applicable to especially dangerous occupations, by which he may recover compensation without fault upon the part of the employer. Const. sec 8, art. 18."

In *Inspiration Consolidated Copper Co. v. Mendez*, (July 2, 1917) 19 Ariz. 151, 157, the supreme court specifically held that the Employers' Liability Law does not conflict with the Fourteenth Amendment, and, among other things, said:

"That the liability statute must

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be construed as one creating a liability for accidents resulting in injuries to the workmen engaged in hazardous occupations due to the risks and hazards inherent in such occupations, without regard to the negligence of the employer, as such negligence is understood in the common law of liability; in other words, such statute creates a liability for accident arising from the risks and hazards inherent in the occupation without regard to the negligence or fault of the employer. . . . In other words, this statute creates a liability of the master to damages suffered from any accident befalling his servant while engaged in the performance of duties in dangerous occupations without requiring the negligence of the master to be shown as an element of the right to recover, and it likewise takes away from the master his common law right of defense of assumption of ordinary risk by the servant, and leaves to the master the right to defend upon the grounds that the servant assumed the ordinary risks, other than risks inherent in the occupation."

This opinion was reaffirmed in *Superior & Pittsburg Copper Co. v. Tomich*, (July 2, 1917) 19 Ariz. 182.

In *Arizona Copper Co. v. Burciaga*, (1918) 177 P. 29, 31, 32, 33, the supreme court said:

"As clearly intimated by this Court in *Inspiration Consolidated Copper Co. v. Mendez*, 19 Ariz. 151, 166 P. 278, 1183, the Employers' Liability Law is designed to give a right of action to the employee injured by accident occurring from risks and hazards inherent in the occupation and without regard to the negligence on the part of the employer. Such is the clear import of the said Employers' Liability Law. . . ."

"The liability incurred by the employer from a personal injury sustained by his employee from an accident arising out of and in the course of labor, service, and employment in hazardous occupations specified in the statute, and due to a condition or conditions of such occupation

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or employment, if such shall not have been caused from the negligence of such employee, is such an amount as will compensate such employee for the injuries sustained by him directly attributable to such accident. . . . 'Liable in damages,' as used in paragraph 3158, c. 6, of title 14, Employers' Liability Law, Rev.Stats. of Ariz.1913, has reference to and means that the employer becomes obligated to pay to the employee injured in an accident while engaged in an occupation declared hazardous, occurring without fault of the employer, all loss to the employee which is actually caused by the accident and the amount of which is susceptible of ascertainment. . . . Of course, mental and physical suffering experienced by the employee injured, proximately resulting from the accident, the reasonable value of working time lost by the employee, necessary expenditures for the treatment of injuries, and compensation for the employee's diminished earning power directly resulting from the injury, and perhaps other results causing direct loss, are matters of actual loss, and as such recoverable."

From the foregoing, it appears that we have for consideration a statute which undertakes, in the absence of fault, to impose upon all employers (individual and corporate) engaged in enterprises essential to the public welfare, not subject to prohibition by the state, and often not attended by any extraordinary hazard, an unlimited liability to employees for damages resulting from accidental injuries -- including physical and mental pain -- which may be recovered by the injured party or his administrator for benefit of widow, children, parents, next of dependent kin, or the estate. The individual who hires only one man and works by his side is put on the same footing as a corporation which employs thousands; no attention is given to probable ability to pay the award; length of service is unimportant -- a minute seems enough; wages contracted for bear no necessary relationship to what may be recovered;

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and a single accident which he was powerless to prevent or provide against may pauperize the employer. And, by reason of existing constitutional and statutory provisions, an injured workman may claim under this act or under the Compensation Law or according to the common law materially modified in his favor by exclusion of the fellow-servant rule and otherwise. On the other hand, while the employer is declared subject to new, uncertain, and greatly enlarged liability notwithstanding the utmost care, nothing has been granted him in return.

In such circumstances, would enforcement of the challenged statute deprive employers of rights protected by the Fourteenth Amendment? Plainly, I think, nothing short of an affirmative answer is compatible with well defined constitutional guaranties.

Of course, the Fourteenth Amendment was never intended to render immutable any particular rule of law, nor did it by fixation immortalize prevailing doctrines concerning legal rights and liabilities. Orderly and rational progress was not forestalled. *Holden v. Hardy*, [169 U. S. 366](#) , [169 U. S. 387](#) . But it did strip the states of all power to deprive any person of life, liberty or property by arbitrary or oppressive action -- such action is never due process of law.

In the last analysis, it is for us to determine what is arbitrary or oppressive upon consideration of the natural and inherent principles of practical justice which lie at the base of our traditional jurisprudence and in spirit our Constitution. A legislative declaration of reasonableness is not conclusive; no more so is popular approval -- otherwise, constitutional inhibitions would be futile. And plainly, I think, the individual's fundamental rights are not proper subjects for experimentation; they ought not to be sacrificed to questionable theorization.

Until now, I had supposed that a man's liberty and property -- with their essential incidents -- were under the

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protection of our charter, and not subordinate to whims or caprices or fanciful ideas of those who happen for the day to constitute the legislative majority. The contrary doctrine is revolutionary, and leads straight towards destruction of our well tried and successful system of government. Perhaps another system may be better -- I do not happen to think so -- but it is the duty of the courts to uphold the old one unless and until superseded through orderly methods.

After great consideration, in *Adair v. United States*, [208 U. S. 161](#) , and *Coppage v. Kansas*, [236 U. S. 1](#) , this Court declared that the Fourteenth Amendment guarantees to both employer and employee the liberty of entering into contracts for service subject only to reasonable restrictions. "The principle is fundamental and vital."

In the first case, an act of Congress prohibiting interstate carriers from requiring one seeking employment, as a condition of such employment, to enter into an agreement not to become or remain a member of a labor organization was declared in conflict with the Fifth Amendment. In *Coppage v. Kansas*, a state statute which declared it unlawful to require one to agree not to be a member of a labor association as a condition of securing employment was held invalid under the Fourteenth Amendment, and we said:

"An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary unless it be supportable as a reasonable exercise of the police power of the state."

In *Truax v. Raich*, [239 U. S. 33](#) , [239 U. S. 41](#) , an Arizona statute prohibiting employment of aliens except under certain conditions was struck down. We there said:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

The right to employ and the right to labor are correlative --

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neither can be destroyed nor unduly hindered without impairing the other. The restrictions imposed by the act of Congress struck down in the *Adair* case, by the Kansas statute declared invalid in the *Coppage* case, and by the Arizona statute held inoperative in the *Truax* case, viewed as practical matters, seem rather trivial in comparison with the burden laid on employers by the statute before us. And the grounds suggested to support it really amount in substance to asserting that the legislature has power to protect society against the consequences of accidental injuries, and therefore it may impose the loss resulting therefrom upon those wholly without fault who have afforded others welcomed opportunities to earn an honest living under unobjectionable conditions. As a measure to stifle enterprise, produce discontent, strife, idleness, and pauperism, the outlook for the enactment seems much too good.

In *New York Central R. Co. v. White*, [243 U. S. 188](#) , and *Mountain Timber Co. v. Washington*, [243 U. S. 219](#) , as I had supposed for reasons definitely pointed out, we held the challenged statutes not in conflict with the Fourteenth Amendment although they imposed liability without fault and introduced a plan for compensating workmen unknown to the common law. The elements of those statutes regarded as adequate to save their validity we specified; if such

characteristics had not been found, the result necessarily would have been otherwise, unless we were merely indulging in harmful chatter.

Here, without fault, the statute in question imposes liability in some aspects more onerous than either the New York or Washington law prescribed, and the grounds upon which we sustained those statutes are wholly lacking. The employer is not exempted from any liability formerly imposed; he is given no *quid pro quo* for his new burdens; the common law rules have been set aside without a reasonably just substitute; the employee is relieved from

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consequences of ordinary risks of the occupation, and these are imposed upon the employer without defined limit to possible recovery which may ultimately go to nondependents, distant relatives, or, by escheat, to the state; "the act bears no fair indication of a just settlement of a difficult problem affecting one of the most important of social relations" -- on the contrary, it will probably intensify the difficulties.

The liability is not restricted to the pecuniary loss of a disabled employee or those entitled to look to him for support, but includes compensation for physical and mental pain and suffering; a recovery resulting in bankruptcy to an employer may benefit only a distant relative, financially independent; the prescribed responsibility is not

"to contribute reasonable amounts according to a reasonable and definite scale by way of compensation for the loss of earning power arising from accidental injuries,"

but is unlimited, unavoidable by any care, incapable of fairly definite estimation in advance, and enforceable by litigation probably acrimonious, long drawn out, and expensive. While the statute is inattentive to the employee's fault, it permits recovery in excess of the employee's pecuniary misfortune, and provides for compensation not general, but sporadic, uncertain, conjectural, delayed, indefinite as to amount, and not distributed over such long period as to afford actual

protection against loss or lessened earning capacity with insurance to society against pauperism, etc.

I am unable to see any rational basis for saying that the act is a proper exercise of the state's police power. It is unreasonable and oppressive upon both employer and employee; to permit its enforcement will impair fundamental rights solemnly guaranteed by our Constitution, and heretofore, as I think, respected and enforced.

THE CHIEF JUSTICE and MR. JUSTICE Mc KENNA and MR. JUSTICE VAN DEVANTER concur in this opinion.

[[Footnote 1](#)]

Laws of Arizona 1912, c. 89, p. 491; Rev.Stats. Ariz. Civil Code 1913, pars. 3153-3162, p. 1051.

"Section 1. That this act is and shall be declared to be an Employers' Liability Law as prescribed in 7 of article XVIII of the state constitution."

"Sec. 2. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway, transportation or any other industry, as provided in said Sec. 7 of Article XVIII of the state constitution, 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 employee shall not have been caused by the negligence of the employee killed or injured."

"Sec. 3. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in Sec. 4 of this Act are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of Sec. 2 of this Act."

"By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

"Sec. 4. The occupations hereby declared and determined to be hazardous within the meaning of this act are as follows:"

"1. The operation of steam railroads, electrical railroads, street railroads, by locomotives, engines trains, motors, or cars of any kind propelled by steam, electricity, cable or other mechanical power, including the construction, use, or repair of machinery, plant, tracks, switches, bridges, roadbeds upon, over, and by which such railway business is operated."

"2. All work when making, using, or necessitating dangerous proximity to gunpowder, blasting powder, dynamite, compressed air, or any other explosive."

"3. The erection or demolition of any bridge, building, or structure in which there is, or in which the plans and specifications require, iron or steel frame work."

"4. The operation of all elevators, elevating machines or derricks or hoisting apparatus used within or on the outside of any bridge, building, or other structure for conveying materials in connection with the erection or demolition of such bridge, building or structure."

"5. All work on ladders or scaffolds of any kind elevated twenty(20) feet or more above the ground or floor beneath in the erection, construction, repair, painting, or alteration of any building, bridge, structure, or other work in which the same are used."

"6. All work of construction, operation, alteration, or repair where wires, cables, switchboards, or other apparatus or machinery are in use charged with electrical current."

"7. All work in the construction, alteration, or repair of pole lines for telegraph, telephone or other purposes."

"8. All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters."

"9. All work in the construction and repair of tunnels, subways and viaducts."

"10. All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises."

"Sec. 5. Every employer, whether individual, firm, association, company or corporation employing workmen in such occupation, of itself or through an agent, shall by rules, regulations, or instructions inform all employees in such occupations as to the duties and restrictions of their employment to the end of protecting the safety of employees in such employment."

"Sec. 6. When, in the course of work in any of the employments or occupations enumerated in Sec. 4 of this act, personal injury or death by any accident arising out of and in the course of such labor, service, and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee, and, if none, then to such employee's parents, and, if none, then to the next of kin dependent upon such employee, and if none, then to his personal representative for the benefit of the estate of the deceased."

"Sec. 7. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this act to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence or has assumed the risk shall be a question of fact and shall at all times be left to the jury, as provided in Sec. 5 of Article XVIII of the state constitution."

"Sec. 8. That any contract, rule, regulation, or device whatsoever the purpose or intent of which shall be to enable any employer to exempt himself or itself from any liability created by this act shall to that extent be void: Provided that, in any action brought against any such employer under or by virtue of any of the provisions of this Act, such employer may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity or that it may have paid to the injured employee or his personal representative on account of the injury or death for which said action was brought."

"Sec. 9. In all actions for damages brought under the provisions of this Act, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful, and the judgment of the lower court is sustained by the higher court or courts, then and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of 12 percent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid."

"Sec. 10. No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

"Sec. 11. All acts and parts of acts in conflict herewith are hereby repealed."

"WHEREAS the state constitution commands the enactment of an Employers' Liability law by the legislature at its first session; and"

"WHEREAS this act being said Employers' Liability law is immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, and this act shall be in full force and effect from and after its passage and its approval by the Governor, and is hereby exempt from the operation of the referendum provision of the state constitution."

[[Footnote 2](#)]

Workmen's Compulsory Compensation Law.

Sec. 2. That compensation graduated according to average earnings and limited to \$4,000

"shall be paid by his employer to any workman engaged in any employment declared and determined . . . to be especially dangerous, whether said employer be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto 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 law affecting such employment."

"Sec. 4. In case such employee or his personal representative shall refuse to settle for such compensation (as provided in Sec. 8 of Article XVIII of the state constitution) and chooses to retain the right to sue said employer (as provided in any law provided for in Sec. 7, Article XVIII of the state constitution), he may so refuse to settle, and may retain said right."

"Sec. 6. The common law doctrine of no liability without fault is hereby declared and determined to be abrogated in Arizona as far as it shall be sought to be applied to the accidents hereinbefore mentioned."

"Sec. 14. . . . Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this act or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the state constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."