Private Law and Public Policy: Negligence Law and Political Change in Nineteenth-Century North Carolina

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The movement to create a new legal history is now underway.[1] At least one legal scholar has recently suggested that legal history may be in the midst of a "golden age."[2] Over the past thirty years literature on the subject has poured forth from law reviews, historical journals, and university presses.[3] The volume of new material, however, does not reflect a unanimity of perspective. Disagreement prevails, especially on broad interpretive issues.[4] On the left, neo-Marxists posit an interpretation that emphasizes the exploitative nature of American law. Marshalling evidence of class tension, these historians have been especially influential since the late 1970s.[5] The majority of legal historians,[6] however, might be described for lack of better terms as either liberal or conservative pluralists. Liberals prefer to emphasize that although the legal system has achieved some give-and-take among competing social groups, there has been a bit more "take" than "give" on the part of the elite.[7] Conservatives argue that legal rules have been shaped largely by considerations other than self-aggrandizement.[8] Finally, a "Law and Economics" perspective[9] assumes that the law has been shaped by a desire to achieve economic efficiency.[10] This view, as narrow intellectual history, has limited usefulness for broader historical explanation.[11] Its conclusions tend to bolster the arguments of the conservative pluralists.[12]

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1. *See* W. NELSON & P. REID, THE LITERATURE OF AMERICAN LEGAL HISTORY (1985); Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563 (1984); Gordon, *Recent Trends in Legal Historiography*, 69 L. LIBR. J. 462 (1976); Hurst, *Old and New Dimensions of Research in United States Legal History*, 23 AM. J. LEGAL HIST. 1 (1979); Note, *The New Legal History: A Review Essay*, 73 NW. U.L. REV. 205 (1978).

2. Finkelman, *Exploring Southern Legal History*, 64 N.C.L. REV. 77, 77-78 (1985).

3. Evidence of the vastness of the new material is found in a five-volume bibliography. K. HALL, A COMPREHENSIVE BIBLIOGRAPHY OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY, 1896-1979 (1984).

4. *See*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d ed. 1985); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); J. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980).

5. Such works are associated with the Critical Legal Studies movement. *See* W. NELSON & P. REID, *supra* note 1, at 261-66. Prominent studies from this perspective include M. HORWITZ, *supra* note 4, and M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860 (1981).

6. *See* W. NELSON & P. REID, *supra* note 1, at 261-302.

7. *See* L. FRIEDMAN, *supra* note 4, at 475-76; Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 396-97 (1951); Schwartz, *Tort Law and the Economy in Nineteenth Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1773 (1981).

8. G. WHITE, *supra* note 4, at 12-19; Schwartz, *supra* note 7, at 1717; Gordon, Book Review, 94 HARV. L. REV. 903, 905-08 (1981) (reviewing G. WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980)).

9. *See* Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974).

10. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 73 (1972).

11. Judge Posner's methodology in the article cited, which describes a database of cases decided at 10-year intervals, systematically excludes any information on the reasoning or outcome of the cases other than materials mentioned explicitly in the cases themselves. *See id.* at 34-35.

12. Judge Posner argues that an effort to achieve economic efficiency, rather than economic

Each of these schools presents its own history of the development of tort law. Morton Horwitz, a leading proponent of the neo-Marxist view, argues that commercial interests conspired to forge a system of rules that promoted industrial development.[13] Although agreeing with Horwitz' views about the fundamental purpose of negligence law, Lawrence Friedman rejects Horwitz' conspiracy thesis.[14] Friedman posits that no single group was able to create and maintain negligence doctrine.[15] Finally, both G. Edward White[16] and Gary Schwartz[17] disagree with the emphasis on economics propounded by Horwitz and Friedman. White accepts the conclusion that the development produced social winners and losers, but emphasizes changes in the thinking of lawyers and judges, and downplays the importance of the external forces of economic transformation.[18] Schwartz rejects the "subsidy thesis" altogether.[19] By focusing on the effect of negligence rules, he denies that tort law acted to support certain economic interests.[20]

This Note addresses whether any of these approaches successfully explains the early development of negligence law in North Carolina. The Note gives special attention to both the reasoning and the outcome of appellate cases.[21] North Carolina is an appropriate forum for study because as an eastern state it was settled well before 1800,[22] and because case reports date from 1778.[23] More significantly, it is a southern state,[24] and the southern response to negligence has been sadly neglected. Historians know little about how negligence law developed in the context of slavery, the Civil War, and Reconstruction, or under the regimes of New South Bourbons or agrarian Populist-Fusionist radicals.[25]

North Carolina's experience is particularly instructive because dramatic changes in the State's political orientation resulted in massive and abrupt shifts in the composition of the state supreme court. Before the Civil War, the court

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subsidy of infant industries, provides a basis for understanding late nineteenth century tort law. *See id.*

13. *See* M. HORWITZ, *supra* note 4, at 98-99.

14. *See* L. FRIEDMAN, *supra* note 4, at 467-87.

15. L. FRIEDMAN, *supra* note 4, at 467-87.

16. G. WHITE, *supra* note 4, at 3.

17. Schwartz, *supra* note 7, at 1772-75.

18. G. WHITE, *supra* note 4, at 3.

19. Schwartz, *supra* note 7, at 1717-18.

20. Schwartz, *supra* note 7, at 1717-18.

21. The research involved locating and reading every North Carolina negligence case that involved claims of damage to livestock or persons between 1780 and 1900. The research also focused on cases involving damage to freight by common carriers decided before 1870, as well as some cases in this category after 1870. The North Carolina Supreme Court was the only appellate court in the State until 1968.

22. Permanent settlement began during the 1650s. By 1800, North Carolina's population ranked third among the states. *See* H. LEFLER & A. NEWSOME, THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA 17, 321 (3d ed. 1973).

23. *See* State v. Smith, 1 N.C. (Mart.) 13 (1778).

24. The prospects of southern legal history recently have been addressed in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH (D. Bodenhamer & J. Ely eds. 1984); Finkelman, *supra* note 2; *Symposium on the Legal History of the South*, 32 VAND. L. REV. 1 (1979).

25. Paul Finkelman has noted that legal historians have written primarily about law in Massachusetts, New York, Pennsylvania, Illinois, and Wisconsin. Finkelman, *supra* note 2, at 78.

reflected the electoral success of prorailroad and prodevelopment Whigs. After the war, a new state constitution and the rise of the Republican party reshaped the court in a Republican mold. In the late 1870s, conservative prorailroad Democrats won control of the court from the Republicans. Finally, antirailroad agrarian radicals and their Republican allies swept the Democrats off the court in 1894, when the judiciary was a leading campaign issue.[26]

This Note concludes that any effort to describe the development of tort law without careful attention to political events or consideration of judges as representatives of political parties will be deficient.[27] Because tort law is a state phenomenon, many of its sources must be analyzed in a local context. Overarching economic or intellectual perspectives or studies of case reports alone tend to isolate decisions from their historical context and result in inappropriate periodization.[28] Legal history must be written with a sensitivity to both political history and chronological development.

Modern negligence law originated in the decisions of nineteenth-century judges.[29] Four concepts in particular were articulated during the formative period of legal fault: negligence, contributory negligence, assumption of risk, and the fellow servant rule.[30] Negligence was stated broadly as a failure to do that which "a reasonable man of ordinary prudence . . . would be expected to do."[31] Yet failure to act in such a manner did not always produce liability. Contributory negligence barred a plaintiff's recovery whenever the plaintiff contributed "to the harm he has suffered" by acting "below the [reasonableness] standard to which he is required to conform for his own protection."[32] Moreover, if the plaintiff was found to have relieved "the defendant of an obligation of [nonnegligent] conduct toward him," there was no liability because the plaintiff was considered to have "assumed the risk" of injury.[33] Finally, nineteenth-century courts extended the assumption of risk doctrine in the employer-employee relationship to include "fellow servants." Employers were not liable for personal

26. Although Democrats have controlled the North Carolina Supreme Court for the past 80 years, the rise of competitive Republicanism in the 1970s renewed debate over the politics of the supreme court. For example, during the election of supreme court justices in 1986 Republicans formed "Citizens for a Conservative Court" and criticized the "liberal" views of some Democratic jurists. Moreover, demands in the 1987 North Carolina General Assembly for a nonelective, nonpartisan system of judicial selection prompted Democratic Lieutenant Governor Robert Jordan to observe that "even in the legal profession" there are persons who believe that nonelective judges are not "as in tune" to public sentiment as they should be. Durham Morning Herald, Feb. 13, 1987, at 17A, col. 2.

27. Even legal historians convinced about the connection between law and politics generally have not bothered to connect tort developments with specific political movements. *See, e.g.*, L. FRIEDMAN, *supra* note 4, at 299-302, 476; M. HORWITZ, *supra* note 4, at 256-57.

28. An example of the problem of periodization appears in Schwartz, *supra* note 7, at 1719. Schwartz analyzes almost 100 years of history in categories of "late nineteenth century" and "mid-nineteenth century." Such a perspective fails to appreciate shifting party alignments or significant changes in court membership. Both of these factors are critical in the decision making process.

29. L. FRIEDMAN, *supra* note 4, at 467-87.

30. L. FRIEDMAN, *supra* note 4, at 467-87.

31. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 150 (4th ed. 1971).

32. *Id.* at 417.

33. *Id.* at 440.

injuries to employees "caused solely by the negligence of a fellow servant."[34]

Although the major doctrines of negligence were not widely used until the middle of the nineteenth century, the law governing legal fault did not arise in a vacuum. Rather, rules relating to various kinds of civil wrongs were well established in the eighteenth and early nineteenth centuries. However, legal historians disagree about the precise manner in which these rules worked. One problem is whether and when strict liability in tort preceded the general application of negligence.[35] For example, Horwitz argues that tort actions in 1800 were decided by assuming strict liability.[36] In contrast, Schwartz, although he suggests that tort law was rather ill-formed until about 1850, contends that even in 1800 strict liability did not fully encompass the way in which courts viewed tort disputes.[37]

Before 1840, relatively few North Carolina cases involved tort claims. During the early nineteenth century, the application of a standard of neglect or strict liability depended entirely on the nature of the relationship between the two disputants. Apparently, no one sought recovery from a stranger on a vague notion of a general duty to prevent harm. Instead, persons sought relief from public servants such as clerks,[38] sheriffs,[39] or overseers of public roads,[40] or from persons involved in contractual arrangements such as bailees.[41] In some of these cases, the plaintiffs were required to show a kind of neglect.[42] Despite the apparent similarity with modern tort language, courts left unclear the precise meaning of "neglect." Early North Carolina judges used the word to mean both fault and strict liability.[43] Neglect meant fault, or lack of due care, in cases involving public clerks, bailees, and overseers of roads.[44] For example, as early as 1792 a superior court instructed a jury that a defendant was responsible only to the rule "which results from natural justice, which requires no more of him than common and usual prudence and diligence in the performance of what he has undertaken."[45] In contrast, sheriffs and common carriers of goods could be held to strict liability.[46] One court noted that common carriers were liable for "all

34. *Id.* at 528.

35. *See* Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 926-28 (1981).

36. M. HORWITZ, *supra* note 4, at 85.

37. Schwartz, *supra* note 7, at 1722-34.

38. *See, e.g.*, Coltraine v. McCain, 14 N.C. (3 Dev.) 308 (1832).

39. *See, e.g.*, Wingate v. Galloway, 10 N.C. (3 Hawks) 6 (1824).

40. *See, e.g.*, Hathaway v. Hinton, 46 N.C. (1 Jones) 243 (1853).

41. *See, e.g.*, Hilliard v. Dortch, 10 N.C. (3 Hawks) 246 (1824).

42. *See, e.g.*, ——— v. Jackson, 2 N.C. (1 Hayw.) 14, 16 (1792).

43. *Compare* Adams v. Turrentine, 30 N.C. (8 Ired.) 147, 149-63 (1847) (negligence means strict liability) *with* Spivey v. Farmer's Adm'r, 3 N.C. (2 Hayw.) 339, 340 (1805) (liability based on fault).

44. *See supra* text accompanying notes 38-41.

45. *Jackson*, 2 N.C. (1 Hayw.) at 16.

46. *See Adams*, 30 N.C. (8 Ired.) at 149-63 (sheriffs); Mabry v. Turrentine, 30 N.C. (8 Ired.) 201, 204-10 (1847) (sheriffs); Harrell v. Owens, 18 N.C. (1 Dev. & Bat.) 273, 275-76 (1835) (common carrier); Adam v. Hay, 7 N.C. (3 Mur.) 149, 149 (1819) (common carrier); Rainey v. Dunning, 6 N.C. (2 Mur.) 386, 387 (1818) (sheriffs); Backhouse v. Sneed, 5 N.C. (1 Mur.) 173, 174 (1808) (common carrier); *Jackson*, 2 N.C. (1 Hayw.) at 15 (common carrier).

losses except such as happen by the act of God or the enemies of the state."[47] Likewise, a sheriff was responsible for "negligent escape" of a prisoner, even if there was no negligence.[48]

Because of this coexistence of fault and strict liability, neither negligence nor strict liability gained recognition as a special branch of the law.[49] Not until the 1850s was "negligence" regularly included in the indexes of case reports,[50] and by 1854 the leading digest of North Carolina cases still lacked any citations to "negligence" cases.[51] Instead, fault concepts were embedded in disputes involving bailments, overseers of roads, and hirers of slaves. Similarly, strict liability was another procedural and substantive rule exercised wholly within the law of specific kinds of relationships. Therefore, each of these relationships had its own basis in common law for applying strict liability.

Changing political and economic circumstances in North Carolina, however, brought about a reconsideration of ideas about negligence or fault. This reconsideration was affected dramatically by renewed political party competition in the 1830s.[52] Public political debate between the newly formed Whigs and the older Democrats focused on whether public funds should be used to support internal improvements.[53] Two developments enhanced the importance of internal improvements. First, many leaders came to believe that without a transportation system linking eastern and western counties large areas of western North Carolina would remain permanently undeveloped.[54] Second, by the early 1830s the railroad had become economically feasible.[55] Politicians of both parties relied on these developments in embarking on a campaign to remake the State with internal improvements. The plan had immediate and widespread appeal, and prodevelopment sentiments substantially controlled the state general assembly between 1836 and 1850.[56]

This political support, which seemed virtually unanimous by the 1850s, provided the basis for a massive public subsidy of the railroads.[57] Bonds

47. *Backhouse*, 5 N.C. (1 Mur.) at 174. The court reasoned that "persons induced to confide in [carriers] in the course of business may receive all possible security." *Id.*

48. *See, e.g., Adams*, 30 N.C. (8 Ired.) at 149-63. On the other hand, sheriffs were scrutinized under a fault standard for other kinds of wrongs. *See, e.g.*, Sherrill v. Shuford, 32 N.C. (10 Ired.) 200 (1849) (fault standard applied regarding execution of process).

49. In North Carolina the evidence tends not to support Horwitz' thesis. *See supra* text accompanying note 36. Instead, the sparsity and nature of the cases lend support to both Rabin's assertions about a lack of general liability and Schwartz' suggestion that strict liability prevailed in only a few situations. *See* Rabin, *supra* note 35, at 926-28, 938; Schwartz, *supra* note 7, at 1730-34.

50. *See, e.g.*, 51 N.C. (8 Jones) 589-90 (1858-59) (index reference to negligence cases).

51. *See* H. JONES, A DIGEST OF REPORTED CASES DETERMINED IN THE SUPREME COURT OF NORTH CAROLINA, 1845-1853 (1854).

52. Williams, *Reemergence of the Two-Party System*, in THE NORTH CAROLINA EXPERIENCE: AN INTERPRETIVE AND DOCUMENTARY HISTORY 242-45 (L. Butler & A. Watson eds. 1984) [hereinafter THE NORTH CAROLINA EXPERIENCE].

53. Jeffrey, *Internal Improvements and Political Parties in Antebellum North Carolina, 1836-1860*, 55 N.C. HIST. REV. 111, 150 (1978); Williams, *supra* note 52, at 246-47.

54. Williams, *supra* note 52, at 246; *see* Jeffrey, *supra* note 53, at 111-14.

55. C. BROWN, A STATE MOVEMENT IN RAILROAD DEVELOPMENT 15-16 (1928).

56. Williams, *supra* note 52, at 247-48.

57. H. LEFLER & A. NEWSOME, *supra* note 22, at 364-65.

amounting to millions of dollars were issued for several railroads.[58] By the 1850s the State was the primary stockholder in the North Carolina Railroad Company, which eventually connected Goldsboro in the east with Charlotte in the west.[59] Railroads soon were able to cut freight rates by half, and cheaper transportation costs increased farm productivity.[60] The railroad did not change the fundamentally rural character of the State, but public leadership, public support, and public money combined to bring about a transportation revolution.[61]

The impact of the railroad on tort law was spectacular.[62] Railroads immediately forced the North Carolina Supreme Court to decide a wholly new kind of dispute.[63] Earlier tort decisions had been analyzed according to the nature of the relationship between the disputants. In the new area of railroad law, however, whether railroads would be held to a standard of negligence, strict liability, or something in between was in doubt.[64] Significantly, between 1840 and 1859 the three-judge North Carolina Supreme Court[65] was dominated by leading Whigs and reflected prevailing prorailroad sentiment.[66] Most prominent among the court's judges were William Gaston,[67] Thomas Ruffin,[68] and Richmond Pearson.[69] These men authored the first opinions elaborating new negligence doctrines. Three decisions between 1840 and 1860 reflected an explicit choice by the court to make liability contingent on proving negligence rather than strict liability.

The first modern North Carolina negligence case was *Ellis v. Portsmouth &*

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58. Williams, *supra* note 52, at 246-47.

59. H. LEFLER & A. NEWSOME, *supra* note 22, at 365; Watson, *"Old Rip" and a New Era*, in THE NORTH CAROLINA EXPERIENCE, *supra* note 52, at 225.

60. H. LEFLER & A. NEWSOME, *supra* note 22, at 366.

61. *See* Watson, *supra* note 59, at 222-25.

62. *See* L. FRIEDMAN, *supra* note 4, at 262-64 (assessing impact of railroads on law in a national context).

63. The earliest railroad case in North Carolina was Raleigh & G.R.R. v. Davis, 19 N.C. (2 Dev. & Bat.) 451 (1837) (recognizing railroads' powers of eminent domain); *see also* J. Carlson, The Iron Horse in Court: Thomas Ruffin and the Development of North Carolina Railroad Law 198-200 (1972) (unpublished master's thesis, University of North Carolina at Chapel Hill) (arguing Ruffin favored railroad development).

64. Because there was no specific North Carolina railroad law before the 1830s, and because the law of torts remained somewhat submerged, the court had almost complete freedom to determine whether railroad cases would be analyzed on a strict liability or fault basis.

65. The North Carolina Supreme Court was created in 1818. Before the constitution of 1868, judges were elected by vote of the general assembly. K. BATTLE, AN ADDRESS ON THE HISTORY OF THE SUPREME COURT 40, 45-46 (1889).

66. Between 1840 and 1859 the six members of the court were Thomas Ruffin (1833-52, 1858-59); Frederick Nash (1844-58); Richmond Pearson (1849-68); Joseph Daniel (1833-48); William Gaston (1833-44); and William H. Battle (1848, 1852-65). Pearson, Gaston, Nash, and Battle were Whigs. Ruffin was a prodevelopment Democrat. *See* NORTH CAROLINA GOVERNMENT, 1585-1979, at 360-61 (J. Cheney ed. 1981) [hereinafter NORTH CAROLINA GOVERNMENT].

67. *See* Clark, *The Supreme Court of North Carolina* (pt. II), 4 GREEN BAG 523, 523-29 (1892).

68. *See* Clark, *The Supreme Court of North Carolina* (pt. I), 4 GREEN BAG 467, 467-74 (1892).

69. *See* Clark, *The Supreme Court of North Carolina* (pt. III), 4 GREEN BAG 535, 535-39 (1892). Before the constitutions of 1866 and 1868, the members of the supreme court were described as "judges" with the exception of the Chief Justice. After 1866, they became Associate Justices. *See* N.C. CONST. of 1865, art. IV, § 2 (1866); N.C. CONST. of 1868, art. IV, § 8; K. BATTLE, *supra* note 65, at 40.

Roanoke Railroad.[70] In *Ellis*, a locomotive accidentally set fire to a fence bordering the company's tracks.[71] At the trial, the judge applied the rule of nuisance law that "every one is bound so to use his own property as not to injure his neighbor."[72] Although affirming the result, Judge Gaston moved to strike any possiblity of strict liability, and held that "no man, unless he has engaged to become insurer . . . against unavoidable accidents, is responsible for damage sustained against his will and without his fault."[73] The court reasoned that when a plaintiff "shows damage resulting from [an] act, which act, with the exertion of proper care, does not ordinarily produce damage," he has made out a prima facie case which can only be rebutted by "proof of care or of some extraordinary accident which renders care useless."[74]

Ellis made it clear that plaintiffs were required to prove more than mere damage before they could recover. By 1849 the supreme court was prepared to place another burden on plaintiffs: the defense of contributory negligence. *Herring v. Wilmington & Raleigh Railroad*[75] involved a claim by a slaveholder for the negligent destruction of his property. Defendant's train struck and killed one slave and badly injured another. Both slaves had fallen asleep on defendant's track.[76] Judge Richmond Pearson, writing for the court, held that the defendant's servants reasonably assumed the slaves would move before the train struck them.[77] Despite their legal status as property, "the negroes were reasonable beings, endowed with intelligence, as well as the instinct of self-preservation and the power of locomotion."[78] Thus, the court held that defendant was not negligent.[79] Encouraged by both parties, however, Judge Pearson described how contributory negligence could be applied.[80] He noted that when both sides are negligent, neither litigant can recover unless there is "wanton injury or gross

70. 24 N.C. (2 Ired.) 138 (1841).

71. *Id.*

72. *Id.*

73. *Id.* at 140. It was some time before trial attorneys and judges were comfortable with the idea of fault in railroad cases. *See, e.g.*, Garris v. Portsmouth & R.R.R., 24 N.C. (2 Ired.) 324 (1842). In *Garris* the trial judge instructed the jury that "the killing of the steer being admitted, the plaintiff was entitled to recover," because any defense by the defendant might "deprive the plaintiff of his right of recovery." *Id.* at 325. The supreme court awarded a new trial on the basis that strict liability was inappropriate. *Id.* Moreover, Judge Gaston's use of "insurer" in *Ellis* suggests the special contractual nature of strict liability for sheriffs and common carriers. *See Ellis*, 24 N.C. (2 Ired.) at 141.

74. *Ellis*, 24 N.C. (2 Ired.) at 141; *see also Garris*, 24 N.C. (2 Ired.) at 325 ("A merely accidental involuntary trespass may be justified.").

75. 32 N.C. (10 Ired.) 402 (1849), *overruled by* Deans v. Wilmington & W.R.R., 107 N.C. 686, 12 S.E. 77 (1890).

76. *Id.* at 402-03.

77. *Id.* at 407-08. The result might have been different if the slaves had been wooden logs or cows. "Wood has neither the instinct of self-preservation nor the power of locomotion." *Id.* at 408. A cow might lose its "natural apprehension of danger by frequently seeing and hearing the [railroad] cars." *Id.*

78. *Id.*

79. *Id.*

80. The attorneys for both sides focused on the issue, and cited a group of English cases that went far beyond the current state of North Carolina law. *Ellis*, *Garris*, and *Herring* suggest that before 1850 the court was still relying on English, not American, precedent. *See Herring*, 32 N.C. (10 Ired.) at 409.

neglect" by one party.[81] Judge Pearson seemed to equate all kinds of neglect except "gross neglect," and argued that if "both are in equal fault, if one can recover so can the other, and thus there would [wrongly] be mutual faults and mutual recoveries."[82] Judge Pearson added that the rule was intended to keep persons off railroad tracks, because a knowledge of impunity from liability "would be an inducement to obstruct the highway and render it impossible for the company to discharge [its] duty to the public, as common carriers."[83]

One other case decided between 1840 and 1860 that illustrates the prorailroad development of early negligence law is *Ponton v. Wilmington & Weldon Railroad*.[84] The dispute in *Ponton* concerned the death of a hired slave, who was crushed by two trains when a fellow employee failed to adjust switches at a station.[85] Judge Ruffin, after summarizing the relevant English and American cases in his opinion, recognized the fellow servant doctrine in North Carolina.[86] His argument emphasized that the rule was so well settled in other jurisdictions that the court would follow the law of those other states.[87] Nonetheless, Ruffin justified the ruling as one "founded on policy and social necessity."[88] He reasoned that employees, when contracting for employment, implicitly agreed that they would be unable to recover from the employer for a fellow servant's negligence.[89] Judge Ruffin dismissed as unwarranted any dis-

81. *Id.*

82. Judge Pearson's statement, of course, ignores the possiblity of different damages, a result not unlikely in railroad cases. The use of the word "equal" also is revealing, because it precluded the early use of comparative negligence. Comparative negligence, which prevails in 43 states but not in North Carolina, apportions damages according to degree of fault. Contributory negligence as a complete bar to recovery is abolished under the rule. *See* 4 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS 263 n.6 (2d ed. 1986).

83. *Herring*, 32 N.C. (10 Ired.) at 408-09. The decision hardly serves as proof that transportation interests took precedence over slave interests. Nonetheless, it does indicate how the North Carolina court reacted when confronted with the competing interests of a railroad and an individual slaveholder.

84. 51 N.C. (6 Jones) 245 (1858).

85. *Id.*

86. *Id.* at 246. The fellow servant rule barred the plaintiff's recovery when injury resulted from the negligence of a "fellow servant" of the plaintiff. *See* 3 F. HARPER, F. JAMES & O. GRAY, *supra* note 82, at 77 n.22. Judge Ruffin chose to rely, in particular, on Priestley v. Fowler, 150 Eng. Rep. 1030 (1837), and Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49 (1842). He noted that North Carolina law would not follow the initial rejection of the rule in Ohio. *Ponton*, 51 N.C. (6 Jones) at 247; *see generally* Little Miami R.R. v. Stevens, 20 Ohio 415 (1851) (rejecting fellow employee rule); L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 166-82 (1957) (extended discussion of *Farwell* and its author); Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579 (1984) (examining origins of fellow servant rule and its exceptions).

87. *Ponton*, 51 N.C. (6 Jones) at 246-47; Comment, *supra* note 86, at 613 n.205.

88. *Ponton*, 51 N.C. (6 Jones) at 246. These reasons were supplied partly by Lord Abinger, author of Priestly v. Fowler, 150 Eng. Rep. 1030 (1837); *see also* Comment, *supra* note 86, at 584-90 (arguing that policy reasons supporting *Priestly* in England were actually a limited effort to extend eighteenth century master-servant relations to newer employer-employee relations). Judge Ruffin, however, had his own reasons for applying the rule in North Carolina. He was well aware that the fellow servant doctrine had its primary cause and justification in the modern demands of nineteenth century industrialization. In *Ponton* he recognized the rule was "of recent occurrence anywhere and owes its origins, or rather prevalence, probably to the great number of servants needed and employed on the steamboats and railroads, which have come so much into use in our times, and on which so many casualties or injuries from negligence happen." *Ponton*, 51 N.C. (6 Jones) at 246.

89. *Ponton*, 51 N.C. (6 Jones) at 246.

tinction between a hired freedman and a slave, who had no power to contract, because the master could contract and sue for recovery.[90]

By 1860 the new negligence law was firmly established in North Carolina. Due care, contributory negligence, and the fellow servant doctrine were a common part of North Carolina lawyers' discourse. During the antebellum period, several kinds of cases involving negligence were decided by the court. A few suits were analogous to the older status or contractual relationship decisions.[91] However, between 1840 and 1860 the largest group of negligence cases—and most of the cases in which the new doctrines were stated—were related to railroads. The majority of railroad disputes fell into two distinct categories: destruction of livestock[92] and destruction of slave property.[93] Considering the favorable political and judicial climate for railroads, it is not surprising that the new legal rules largely worked in the favor of railroad interests. Although there were less than fifteen such railroad cases altogether, the railroads or their agents won almost all the slave injury cases,[94] and initially prevailed under the court's view of negligence cases involving livestock.[95] Only after the general assembly changed the law in 1857 by creating a burden of proof on the railroad in livestock cases did plaintiffs tend to prevail in that category.[96]

The language and reasoning of the railroad decisions also evinced the court's predisposition to railroad interests. First, all decisions had the effect of placing burdens on the plaintiff rather than the defendant.[97] This was especially true in *Ponton* and *Herring*,[98] in which Judges Pearson and Ruffin chose to recognize a rule that denied recovery even if the defendant or his agent was negligent. Second, the court decided to follow precedent selectively.[99] Although

90. *Id.* at 247-48. Judge Ruffin suggested the injustice of allowing a slave to recover when a freedman could not. *Id.* at 248; *see also* Finkelman, *supra* note 2, at 94 (noting that North Carolina was the only southern state to apply the fellow servant rule to slaves).

91. *See, e.g.*, Woodard v. Hancock, 52 N.C. (7 Jones) 384 (1860) (medical malpractice); Garrett v. Freeman, 50 N.C. (5 Jones) 78 (1857) (violation of statutory restraints on burnings); Averitt v. Murrell, 49 N.C. (4 Jones) 322 (1857) (same).

92. *See, e.g.*, Laws v. North Carolina R.R., 52 N.C. (7 Jones) 468 (1860); Montgomery v. Wilmington & W.R.R., 51 N.C. (6 Jones) 464 (1859); Scott v. Wilmington & W.R.R., 49 N.C. (4 Jones) 432 (1857).

93. *See, e.g.*, Haden v. North Carolina R.R., 53 N.C. (8 Jones) 362 (1861); Poole v. North Carolina R.R., 53 N.C. (8 Jones) 340 (1861); Ponton v. Wilmington & W.R.R. 51 N.C. (6 Jones) 245 (1858); Couch v. Jones, 49 N.C. (4 Jones) 402 (1857).

94. *See* cases cited *supra* note 93.

95. *See* Scott v. Wilmington & W.R.R., 49 N.C. (4 Jones) 432 (1857).

96. Act of Feb. 2, 1857, ch. 7, § 1, 1856-57 N.C. Sess. Laws 6, 6 (codified at N.C. GEN. STAT. § 62-241 (1982)). Because the only witness to most livestock accidents was an employee of the railroad, the original rule made opportunities for recovery for killed livestock difficult. Tables 1 and 2 in the Appendix reveal the outcome of early North Carolina negligence cases. Several factors deserve special mention. First, all of the plaintiffs' successes in livestock actions occurred after passage of the 1857 statute. Second, railroad defendants were especially successful in the injured "persons" disputes, in which contributory negligence and the fellow servant rule had their greatest effect. Third, there is a great discrepancy between the success of plaintiffs in nonlivestock, nonrailroad property appeals and those same decisions in railroad cases. Finally, the overall effect of contributory negligence is dramatically illustrated by the fact that slaveholders lost 10 of the 11 suits for compensation for "damaged" slaves.

97. *See supra* notes 62-83 and accompanying text.

98. *See supra* notes 75-90 and accompanying text.

99. For example, the court approved of Priestly v. Fowler, 150 Eng. Rep. 1030 (1837), and

Judge Ruffin's language in *Ponton* seemed to follow "pure reason," it plainly rejected what were considered judicial norms in other jurisdictions.[100] Finally, the prorailroad characteristics of early North Carolina tort law were made more palatable by the lack of a single legal standard recognizing recovery for personal injury. Of course, slaves were incapable of suing in their own right: they were trapped in an unfortunate position that emphasized their legal status as property. Nonetheless, the court recognized them as human beings for purposes of contributory negligence and the fellow servant rule. The North Carolina court tried to accommodate the apparent contradiction, quite ironically, by treating the slave as the first model of the reasonable person.[101]

Between 1869 and 1879, as in the antebellum period, North Carolina negligence law reflected political and economic developments. The decline in railroad operations during the Civil War led to a precipitate drop in the number of negligence cases before the court.[102] As a result, there were no important fault cases between 1863 and 1869. Nonetheless, by the 1870s the volume of negligence cases increased and the court began to reconsider its earlier decisions. As had been true before 1860, the supreme court of the 1870s considered the usual disputes involving killed or injured livestock,[103] miscellaneous damages to personal and real property,[104] and contractual relationships, especially contracts involving the railroads as common carriers of freight.[105] Most importantly, parties brought personal injury suits before the court for the first time. As a result, the two major negligence defenses that had developed with regard to slaves during the 1840s and 1850s—contributory negligence and the fellow servant doctrine—began to be used against whites. These defenses were especially prominent in the two kinds of cases that would dominate the whole of late nineteenth century negligence law: railroad employee injuries[106] and injuries to railroad passengers and pedestrians at railroad crossings.[107] Analysis of these cases reveals that the Republican Reconstruction court of the late 1860s and 1870s moved away from the prorailroad decisions of its antebellum predecessor.

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rejected Little Miami R.R. v. Stevens, 20 Ohio 415 (1815). It accepted contributory negligence and rejected last clear chance. It applied the fellow servant rule to slaves, whereas courts of other southern states chose a different rule. *See supra* notes 80, 86 & 90 and accompanying text.

100. "Reason" is used in the sense of "intellectual norms within the legal community," rather than "long-range policy goals." *See* Comment, *supra* note 86, at 618. This Note argues that subtle differences in doctrine, impelled by political conditions and beliefs, were more important than the desire (which North Carolina shared) for a harmonious national law.

101. *See, e.g.*, Couch v. Jones, 49 N.C. (6 Jones) 402, 408 (1857); *Herring*, 32 N.C. (10 Ired.) at 408.

102. *See* C. BROWN, *supra* note 55, at 148-49, 188, 231-32.

103. *See, e.g.*, Page v. North Carolina R.R., 71 N.C. 222 (1874); Jones v. North Carolina R.R., 67 N.C. 122 (1872).

104. *See, e.g.*, Doggett v. Richmond & D.R.R., 78 N.C. 305 (1878) (fence); Troxler v. Richmond & D.R.R., 74 N.C. 381 (1876) (fence).

105. *See, e.g.*, Capehart v. Seaboard & R.R.R., 81 N.C. 437 (1879) (bales of cotton); Smith v. North Carolina R.R., 64 N.C. 234 (1870) (same).

106. *See, e.g.*, Johnson v. Richmond & D.R.R., 81 N.C. 453 (1879); Dobbin v. Richmond & D.R.R., 81 N.C. 446 (1879); Crutchfield v. Richmond & D.R.R., 76 N.C. 320 (1877); Hardy v. North Carolina Cent. R.R., 74 N.C. 745 (1876).

107. *See, e.g.*, Manly v. Wilmington & W.R.R., 74 N.C. 655 (1876); Lambeth v. North Carolina R.R., 66 N.C. 494 (1872).

Both contributory negligence and personal injury were involved in *Manly v. Wilmington & Weldon Railroad.*[108] The decision represented the court's most thorough early discussion of contributory negligence. In a scenario quite similar to *Herring*, two black girls fell asleep on company railroad tracks near Weldon.[109] The engineer, who failed to see the girls until the train was only two hundred feet from where they slept,[110] was unable to stop before the train struck and killed one of the girls.[111] The primary issue was whether the trial court erred when it failed to submit an instruction to the jury on contributory negligence.[112] The supreme court took the opportunity to expound on the law of contributory negligence in North Carolina. Justice Bynum stated the rule as follows:

> [W]hen the injury arises from neither malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied upon the ground that the injured party must be taken to have brought the injury upon himself.[113]

The significance of *Manly* is not that recovery could have been denied on either negligence or contributory negligence grounds, but that Justice Bynum's discussion reflected a sophistication that was lacking in earlier decisions. Specifically, the court probed the issues of degrees of negligence[114] and causation.[115] Regarding degrees of negligence, the court maintained that negligent plaintiffs could recover if the defendant's negligence was willful or wanton.[116] More significantly, the court for the first time enumerated rules that would provide recovery to the plaintiff if the plaintiff's negligence was only a remote rather than the proximate cause of the injury.[117] The court also recognized there could be recovery if a plaintiff could not have avoided the accident by ordinary care.[118] Although Justice Bynum expressed concern that too much lenience toward negligent plaintiffs might be disastrous to "commercial life," it was significant that

108. 74 N.C. 655 (1876).
109. *Id.* at 655-56.
110. *Id.* at 656.
111. *Id.*
112. *Id.* at 657-58.
113. *Id.* at 659.
114. *Id.* at 658-60. Justice Bynum's opinion recognized that contributory negligence was not uniformly applied in different jurisdictions, but ranged from extreme prodefendant positions, as in Massachusetts, *see* Murphy v. Deane, 101 Mass. 455 (1869), to extreme proplaintiff positions, as in Illinois, *see* Chicago & A.R.R. v. Pondrom, 51 Ill. 333 (1869). The North Carolina Supreme Court rejected the extremes and selected a version "most approved by the decisions and most agreeable to reason and justice." *Manly*, 74 N.C. at 658-59. The court continued to allow contributorily negligent plaintiffs to recover whenever the defendant was guilty of willful and wanton neglect. In cases without willful and wanton neglect, the *Manly* court assumed that when the parties were "mutually in fault, there can be no apportionment of damages, no rule existing in such cases to settle what one shall pay more than another." *Id.* at 659. In most states, however, the modern doctrine of comparative negligence has rejected this assumption. *See supra* note 82.
115. *Manly*, 74 N.C. at 658-60.
116. *Id.* at 659.
117. *Id.* at 660.
118. *Id.*

the court, particularly in distinguishing remote from proximate cause, was willing to find grounds for less defendant-oriented decisions.[119]

During the 1870s fellow servant cases presented frustrating problems for the court, largely because of the difficulty of devising a satisfactory definition of just who was a fellow servant.[120] In fact, the court on several occasions seemed to dislike the rule set forth in *Ponton*.[121] Justice Reade, in particular, revealed his displeasure with the railroad's position on the issue. On a petition for rehearing a railroad employee case, *Hardy v. Carolina Central Railway*,[122] Justice Reade admonished attorneys for the railroad that he had considered application of the fellow servant rule in North Carolina quite carefully and still had reason to find for the plaintiff.[123] Justice Reade subsequently established an exception to the fellow servant rule. He argued that employers, by neglect of machinery or by employment of an unfit servant, could be barred from using the fellow servant defense.[124] The court later modified this exception by holding that if the plaintiff did not notify his employer of known defects, or if he notified his employer but knew the problems had not been remedied, he assumed the risk of continued work.[125] As a result, by 1880 the fellow servant rule had passed through a period of doctrinal flexibility in which the court used great discretion to expand or contract the rule's effect.

Greater sophistication on the issue of causation and some movement to limit the harshness of the fellow servant rule were both evidence of a trend that made negligence law less of a subsidy to the railroads than it had been during the 1840s and 1850s. In fact, the North Carolina decisions indicate that railroads and plaintiffs were about equally successful in the supreme court.[126] This was true in cases involving personal injury, livestock accidents, and damage to other kinds of property. As in the earlier period of general support for railroad construction, the best explanation of judicial behavior in the 1870s arises out of

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119. *Id.* at 661.

120. Justice Edwin G. Reade noted that "[w]ho is a *fellow servant*, and what is *the same employment*, are often questions of difficulty, and depend upon the circumstances of each case." Hardy v. Carolina Cent. Ry., 76 N.C. 5, 8 (1877) (per curiam).

121. *See supra* notes 84-90 and accompanying text.

122. 76 N.C. 5 (1877) (per curiam).

123. *Id.* at 7-8.

124. According to the *Hardy* court,

> If it was the duty of the section master to be at the break and give the warning, and he neglected his duty and allowed an excursion train full of human beings to pitch into a gorge and cripple and kill, and the defendant [railroad] kept him employed after [it] knew of his negligence, it makes the defendant a monster nuisance which ought to be abated by the force of public indignation.

Id. at 8.

125. *See* Crutchfield v. Richmond & D.R.R., 76 N.C. 320, 323 (1877) (per curiam).

126. *See supra* notes 103-07 and accompanying text. Research uncovered few nonrailroad appeals between 1869 and 1879. *See* Jackson v. Comm'rs of Greene County, 76 N.C. 282 (1877) (per curiam) (repair of public bridge); Bryan v. Fowler, 70 N.C. 596 (1874) (per curiam) (duty of care of bailee); Anderson & Young v. Cape Fear Steamboat Co., 64 N.C. 399 (1870) (per curiam) (fire caused by sparks from steamboat); Morrison v. Cornelius, 63 N.C. 346 (1869) (per curiam) (manufacturer's exposure of poisonous substance to cattle). Three of the four cases were decided in favor of the defendants. Compare Table 3, which suggests that plaintiffs and defendants were treated similarly in all types of disputes.

political and economic circumstances. By the 1870s, the railroad no longer enjoyed the public favor that it had during the 1850s. One historian of North Carolina railroads has suggested there "was a cooling of the ardor of the people" for railroads.[127] The decline in public sentiment was largely a result of the dissatisfaction among many Democrats and Republicans with the corruption associated with railroad bonds in the late 1860s.[128] Although in the years immediately following the Civil War there was great support for building new railroads with public monies,[129] by the 1870s the backlash against bond fraud helped to push the ownership and management of the formerly state-owned railroads into private hands. Increasingly, those who controlled the railroads were northern capitalists.[130]

In addition, the supreme court of the 1870s had been remade completely by the new constitution of 1868.[131] The Reconstruction constitution increased the number of justices to five and required that they be elected by the public.[132] All eight justices who sat on the new court between 1868 and 1878 were Republicans.[133] A number of these men were among the most prominent founders of the state Republican Party, created in 1867.[134] In contrast to their predecessors in the 1840s and 1850s, the Republicans were somewhat divided in their attitudes toward the railroads. As already noted, Justice Reade displayed some dissatisfaction with railroad defendants,[135] but other justices seemed to favor them.[136] Correspondingly, the tort decisions of the court reflected the new and more diverse orientation of the justices. Similarly, the rulings of the court reflected division within the Republican Party and the new popular ambivalence toward the railroads.[137]

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127. *See* C. BROWN, *supra* note 55, at 284.

128. *See* J. Price, Railroads and Reconstruction in North Carolina 604-07 (1959) (unpublished doctoral dissertation, University of North Carolina at Chapel Hill).

129. *Id.* at 597.

130. *Id.* at 608.

131. N.C. CONST. of 1868, art. IV. A determined effort to reform the State's legal institutions characterized Reconstruction in North Carolina. The most significant change directly affecting the supreme court was the requirement that the justices be elected by popular vote. *Id.* art. IV, § 26. The Constitution of 1868 also abolished the distinction between actions at law and suits in equity, mandated a complete revision of civil procedure, and provided for a sweeping codification of North Carolina law. *Id.* art. IV, §§ 31-3.

132. *Id.* art. IV, §§ 8, 26.

133. The justices were Robert Dick (1868-72); Edwin Reade (1868-79); William Rodman (1868-79); Thomas Settle (1868-76); Nathaniel Boyden (1871-73); William Bynum (1873-79); William Faircloth (1875-79); and Richmond Pearson (1868-78). The new state constitution and the Republican majority in the electorate in 1868 ensured that the new court would be filled with Republicans. *See* NORTH CAROLINA GOVERNMENT, *supra* note 66, at 575. Unfortunately, there is no detailed scholarly study of this Reconstruction court.

134. They included Justices Dick, Rodman, and Settle. *See* H. LEFLER & A. NEWSOME, *supra* note 22, at 488. Justice Dick was the first to call for organization of the new party. *Id.*

135. *See, e.g.*, Hardy v. Carolina Cent. Ry., 76 N.C. 5 (1877); *supra* notes 122-24 and accompanying text.

136. *See* Murphy v. Wilmington & W.R.R., 70 N.C. 437, 439 (1874) (per curiam) (remarks by Settle, J.).

137. For a recent endorsement of the view that North Carolina Republicans should be considered reformers who were able to effect "a notable and generally positive record of achievement," see Trelease, *Reconstruction: The Halfway Revolution*, in THE NORTH CAROLINA EXPERIENCE, *supra* note 52, at 292.

The period of Republican dominance in North Carolina was relatively brief. As early as the election of 1870 Democrats were able to recapture the general assembly.[138] Although Democrats continued to lose some statewide elections before 1876, including the governorship in 1872, by the last years of the decade all three branches of state government were controlled by Democrats.[139] As was characteristic of many antebellum leaders, Democrats in the late nineteenth century were generally committed to a policy of economic development. But by the 1880s proindustrial policy was advanced less by large public investments than by a more indirect variety of legislation.[140] Under the rubric of laissez-faire, Democrats slashed expenditures for education, enacted regressive taxes, exempted railroads from taxation, and opposed any kind of legislation to regulate industry, railroads, or working conditions.[141] The State's railroad holdings were sold or leased to private companies, often at low prices.[142] Combining this economic program with racism, Democrats carried out their economic policies under the unifying banner of white supremacy.[143]

The 1880s represented a turning point in North Carolina history, as railroad construction and industrial development began to change the State's economic structure.[144] More railroad mileage was added during the 1880s than had been built in the entire period between 1835 and 1880.[145] Penetration of the railroad into new areas helped bring about a revolution in agriculture and pushed thousands of farmers into the international cotton market. Unfortunately, these events increased dependence on cotton production and falling cotton prices caused many of these farmers to sink into impoverished tenancy.[146] On the other hand, those who were able to exploit the new market-oriented economy prospered. Both the Dukes in Durham and Robert Reynolds of Winston-Salem rose to wealth during the 1880s.[147] Textile mills prospered throughout the State's Piedmont region.[148] By 1890, transportation, manufacturing, and commercial agriculture had developed far beyond the expectations of even the most optimistic mid-nineteenth-century developers.

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138. *See generally* H. LEFLER & A. NEWSOME, *supra* note 22, at 487-502 (describing the political conditions in North Carolina during Reconstruction).

139. All the judges who served between 1880 and 1894 were Democrats: William N.H. Smith (1878-89); Augustus Merrimon (1883-92); Thomas S. Ashe (1879-87); John H. Dillard (1879-81); Thomas Ruffin, Jr. (1881-83); Joseph J. Davis (1887-92); James E. Shepard (1889-95); Armistead Burwell (1892-95); James MacRae (1892-95); Walter Clark (1889-1924); and Alphonso Avery (1889-97). NORTH CAROLINA GOVERNMENT, *supra* note 66, at 575-76. Between 1879 and 1888 the court was reduced to three members; after 1888 the court's size was again increased to five. *Id.* at 878, 887-88.

140. H. LEFLER & A. NEWSOME, *supra* note 22, at 542.

141. H. LEFLER & A. NEWSOME, *supra* note 22, at 542.

142. H. LEFLER & A. NEWSOME, *supra* note 22, at 516-17.

143. H. LEFLER & A. NEWSOME, *supra* note 22, at 543.

144. H. LEFLER & A. NEWSOME, *supra* note 22, at 506-07; Durden, *North Carolina in The New South*, in THE NORTH CAROLINA EXPERIENCE, *supra* note 52, at 310-14.

145. Between 1880 and 1890 railroad mileage increased from 1,486 miles to 3,001 miles. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1923, at 386 (1924).

146. Durden, *supra* note 144, at 314-15.

147. Durden, *supra* note 144, at 312-13.

148. Durden, *supra* note 144, at 313-14.

The departure of Republicans from the supreme court and the ascendancy of prorailroad Democrats coincided with a decisive shift in the development of North Carolina negligence law. In addition, the increasing reach of the railroads affected the nature and frequency of cases coming before the court. Familiar complaints appeared from the owners of deceased horses, cows, and pigs—all unfortunate victims of the locomotive.[149] Likewise, burning barns, burning houses, and damaged crops were common.[150] However, these typical antebellum and Reconstruction property cases were outnumbered by the increasing number of instances of employee injury disputes.[151] And employee cases were rivaled by the number of pedestrians and passengers maimed or killed by or on North Carolina trains.[152] Therefore, changes in the State's economy in the 1880s led to an increase in negligence and personal injury cases before the court.[153]

The political success of the Democrats[154] helped railroad defendants prevail over plaintiffs twice as often in employee cases.[155] The prodefendant logic of the new 1880s court was particularly notable in *Owens v. Richmond & Danville Railroad*.[156] Owens, an engineer, was killed when his train ran into a mass of debris that had fallen on the track.[157] The question before the court was whether Owens was contributorily negligent by failing to stop the train.[158] After considering the rules in other jurisdictions, the court held that plaintiff had the burden not only of proving the defendant company was negligent, but also that he himself was not negligent.[159] Chief Justice Smith emphasized that it was not proper "to burden the defence" by presuming that the plaintiff acted with due care.[160] In a vigorous dissent, Justice Ruffin argued that the court's rule was "illogical" and that it rejected the "reasonable presumption, which the com-

149. *See, e.g.*, Farmer v. Wilmington & W.R.R., 88 N.C. 564 (1883).

150. *See, e.g.*, Emery v. Raleigh & G.R.R., 102 N.C. 209, 9 S.E. 139 (1889).

151. *See, e.g.*, Patton v. Western North Carolina R.R., 96 N.C. 455, 1 S.E. 863 (1887); Pleasants v. Raleigh & A.R.R., 95 N.C. 195 (1886); Kirk v. Atlanta & C. Air-Line R.R., 94 N.C. 625 (1886).

152. *See, e.g.*, Daily v. Richmond & D.R.R., 106 N.C. 301, 11 S.E. 320 (1890); Smith v. Richmond & D.R.R., 99 N.C. 241, 5 S.E. 896 (1888); Brazil v. Western North Carolina R.R., 93 N.C. 313 (1885).

153. *See* Tables 4 & 5. The 1880s was also the first decade in which personal injury suits outnumbered property damage suits. In fact, the number of personal injury suits outnumbered property damage suits by more than two to one. Tables 4 and 5 illustrate these developments. The greatest distinction within the railroad category is between results in personal injury cases, in which contributory negligence and the fellow servant rule had their greatest effect, and property damage cases. As in the antebellum period, nonrailroad plaintiffs fared significantly better than railroad plaintiffs. Railroad employees, and indeed employees generally, fared least well, as had been the case with slaves in the 1840s and 1850s.

154. *See supra* notes 138-48 and accompanying text.

155. Attorneys' strategies in these disputes varied from case to case, but if the facts permitted, defense counsel attempted to plead both contributory negligence and the fellow servant rule. Plaintiffs' representatives often tried to keep out contributory negligence instructions, or to get jury instructions on the issue of whether the defendant had negligently hired a fellow servant. *See, e.g.*, Kirk v. Atlanta & C. Air-Line R.R., 97 N.C. 82, 83-86, 2 S.E. 536, 537-38 (1887).

156. 88 N.C. 502 (1883).

157. *Id.* at 503-04.

158. *Id.* at 504.

159. *Id.* at 511-12.

160. *Id.* at 512.

mon law always makes, that every person does his duty until the contrary is shown."[161] Although *Owens* may be an extreme example, it demonstrates a shift in the balance of the court and a renewed willingness to place additional burdens on plaintiffs.[162]

As in the employee cases, railroads prevailed in almost two of every three nonemployee personal injury appeals to the Democratic court. For example, in *Daily v. Richmond & Danville Railroad*,[163] Hiram Daily, described as an "idiot," wandered onto the defendant's track and was struck and injured by a train.[164] Justice Avery denied recovery.[165] First, plaintiff had been unable to establish facts proving the negligence of defendant, largely because of plaintiff's mental condition.[166] Second, even if he had been able to show defendant's negligence, plaintiff had to escape the imputation of contributory negligence by proving the engineer knew of plaintiff's mental deficiency and thus had reason to stop the train.[167] In short, although the *Owens* court held that plaintiff could not be presumed to have acted reasonably, defendant in *Daily* was insulated by a holding that allowed the engineer to presume that plaintiff was acting reasonably. The crux of the reasoning in *Daily* was a policy decision that it was unnecessary for the engineer "to delay the train by [reducing] its speed merely because an apparently and presumably reasonable human being was crossing at a point far enough in his front to enable him to stop it, if he chose, before reaching such person."[168] On this logic, the railroad company prevailed in *Daily*.[169]

By 1890 negligence law had achieved apparent certainty. Because the law had been developed almost entirely in railroad accident cases, the courts had been able to craft with some particularity the respective duties of plaintiff and defendant. Although engineers could assume that persons crossing the track were acting reasonably, they were obligated to maintain safe speeds[170] and provide some warning at crossings.[171] If these requirements were met, negligence was difficult to prove, especially because the plaintiff was held to the more uncer-

161. *Id.* at 517 (Ruffin, J., dissenting).

162. The decision in *Owens* reveals that the common law of negligence, as in the 1840s and 1850s, was more favorable to the railroads than was statutory law. Within four years the Democratic general assembly overruled *Owens* by placing the burdens of pleading and proving contributory negligence on the defendant. Act of Jan. 26, 1887, ch. 33, § 1, 1887 N.C. Sess. Laws 81, 81 (codified at N.C. GEN. STAT. § 1-139 (1983)).

163. 106 N.C. 301, 11 S.E. 320 (1890).

164. *Id.* at 302, 11 S.E. at 320. Plaintiff, despite his lack of mental aptitude, was not represented by counsel. *Id.*

165. *Id.* at 306-07, 11 S.E. at 320.

166. *Id.* at 306-07, 11 S.E. at 321.

167. *Id.* at 307, 11 S.E. at 321. This part of the decision involved the doctrine of last clear chance, which had been adopted formally in North Carolina in a nonrailroad case. *See* Gunter v. Wicker, 85 N.C. 310 (1881). The doctrine allowed the negligent plaintiff to recover if the defendant had the "last clear chance" to avoid the accident. Essentially, the rule as stated by the *Gunter* court seems to have had no effect on the prorailroad tendency of the court in the 1880s. Therefore, the doctrine did no more than add a formal name to the causation issues discussed in *Manly*. *See id.* at 312; *supra* notes 108-19 and accompanying text.

168. *Daily*, 106 N.C. at 307, 11 S.E. at 321.

169. *Id.*

170. *See, e.g.*, Nance v. Carolina Cent. R.R., 94 N.C. 619, 622-24 (1886).

171. *See, e.g.*, Troy v. Cape Fear & Y.V.R.R., 99 N.C. 298, 304, 6 S.E. 77, 80 (1888).

tain duty to use "that degree of care and circumspection, which is necessary to secure his safety."[172] However, as might be surmised from the shifting directions of the court between 1840 and 1880, such certainty was an illusion; largely because of the inherent vagueness of the concepts of proximate cause and due care, results remained subject to judicial discretion. The persistent flexibility of negligence law was demonstrated again during the 1890s.

Unfortunately for conservative Democrats, the 1890s was perhaps the greatest period of political and social turmoil in recent North Carolina history.[173] The basis of this upheaval lay in the financial collapse of many of the State's smaller white farmers, who comprised a plurality of the State's population. By 1890 they had united in a kind of rural union, the Southern Farmers' Alliance.[174] The Alliance claimed millions of members across depressed commercial farming regions of the South and the Great Plains.[175] National Alliance platforms demanded a government agricultural warehousing program, an end to deflationary monetary policies, government ownership of railroads, and a greater participation of farmers in politics.[176] In North Carolina the Alliance established marketing cooperatives and rejected the Democratic approaches to taxation, education, and transportation.[177] The Alliance supported strict state regulation of railroad rates, equal taxation of railroads, and public funding for public schools, and even attacked the white supremacist tenor of Democratic politics.[178] It barred attorneys from the organization's membership rolls, and tended to consider the profession corrupt and subservient to big business and railroad interests.[179]

Despite the rise of Alliance radicalism, some Democratic leaders were reluctant to accommodate farmers. Most Democrats continued to recount the "horrors" of "black rule" during Reconstruction and to make a general appeal to racial prejudice.[180] Alliance leaders, however, soon perceived the potential political power of the movement and pushed it into Democratic party politics.[181] After a series of partial victories, including the election in 1890 of a general assembly dominated by the Alliance,[182] the agrarians split off from the

172. Rigler v. Charlotte, C. & A.R.R., 94 N.C. 604, 609 (1886).

173. Crow, *Cracking the Solid South: Populism and the Fusionist Interlude*, in THE NORTH CAROLINA EXPERIENCE, *supra* note 52, at 335.

174. L. STEELMAN, THE NORTH CAROLINA FARMERS' ALLIANCE: A POLITICAL HISTORY, 1887-1893 1-4 (1985). *See generally* R. MCMATH, POPULIST VANGUARD: A HISTORY OF THE SOUTHERN FARMERS' ALLIANCE (1975) (a general history of the Alliance).

175. R. MCMATH, *supra* note 174, at 151.

176. R. MCMATH, *supra* note 174, at 90-91.

177. Crow, *supra* note 173, at 335-36; Durden, *supra* note 144, at 317-18.

178. L. STEELMAN, *supra* note 174, at 81-83.

179. *See* L. STEELMAN, *supra* note 174, at 18, 34, 65; Hunt, *The Making of a Populist: Marion Butler, 1863-1895* (pt. 2), 62 N.C. HIST. REV. 179, 185 (1985).

180. Durden, *supra* note 144, at 318-19.

181. L. STEELMAN, *supra* note 174, at 24-58.

182. *See generally* W. Boyette, The North Carolina Alliance Legislature of 1891: Harvest Time for the Farmer (1984) (unpublished master's thesis, East Carolina University) (discussing predominance of Alliance members in the general assembly and their efforts to create a commission to regulate railroads and to assess fairly the railroad's property for tax purposes).

Democrats in 1892 and formed the North Carolina People's Party.[183] Significantly, this new organization attempted to achieve something rarely tried in North Carolina: a political coalition of reformers, poorer farmers, and—after a political agreement between the Populists and the Republicans in 1894—blacks.[184] This "fusion" of Populists and the Republicans led to the election of two United States senators, several congressmen, a governor, and the only two non-Democratic general assemblies since the 1860s.[185] The legislature proceeded to increase expenditures for public schools and to lower the legal rate of interest. Reflecting the centrality of the reformers' antirailroad zeal, the general assembly raised railroad taxes.[186] The Fusionists' desire for reform was advanced further in 1894, when a combination ticket of two Republicans, one Democrat, and one Populist was elected to the state supreme court.[187] By 1897 the entire court was composed of Fusionists.[188]

After the new court began to sit in 1895, the prorailroad decisions of the period of Democratic ascendancy came to an abrupt halt. Contrary to the nonemployee personal injury cases of the 1880s, the court between 1895 and 1900 ruled more than two-to-one in favor of plaintiffs.[189] Similarly, in employee injury cases the court decided disputes in favor of plaintiffs by more than a two-to-one ratio.[190] Indeed, when for the first time nonrailroad negligence and personal injury decisions gained some importance, the Fusion court ruled against corporate defendants in virtually every case.[191] Such a spectacular change was justified, as were earlier prorailroad decisions, on both doctrinal and policy grounds. The Fusion court proved that it was just as "logical" and "creative" as

183. *See* L. STEELMAN, *supra* note 174, at 205-68.

184. Crow, *supra* note 173, at 335-37.

185. These were the general assemblies of 1895 and 1897. Crow, *supra* note 173, at 337-39.

186. *See* Trelease, *The Fusion Legislatures of 1895 and 1897: A Roll Call Analysis of the North Carolina House of Representatives*, 57 N.C. HIST. REV. 280, 300-01 (1980).

187. The Fusionists elected in 1894 included William Faircloth (Republican, 1895-1900); David Furches (Republican, 1895-1901); Walter Clark (a Democrat but supported by the Fusionists, 1889-1924); and Walter Montgomery (Populist, 1895-1905). The term of Democrat Alphonso Avery did not expire until 1897. *See* NORTH CAROLINA GOVERNMENT, *supra* note 66, at 575-76.

188. Republican Robert M. Douglas (1897-1905) replaced Justice Avery in 1897. *See* NORTH CAROLINA GOVERNMENT, *supra* note 66, at 576.

189. Tables 6 and 7 illustrate the about-face of the court in its position on personal injury appeals—especially those of employees, who prevailed in 20 of 27 disputes. Examples of nonemployee personal injury cases between 1895 and 1899 include Cogdell v. Wilmington & W.R.R., 124 N.C. 302, 32 S.E. 706 (1899); McIlhaney v. Southern Ry., 122 N.C. 995, 30 S.E. 127 (1898); McLamb v. Wilmington & W.R.R., 122 N.C. 862, 29 S.E. 894 (1898); Hinshaw v. Raleigh & A. Air Line R.R., 118 N.C. 1047, 24 S.E. 426 (1895).

190. *See, e.g.*, Pleasants v. Raleigh & A.R.R., 121 N.C. 492, 28 S.E. 267 (1897); Rittenhouse v. Wilmington St. Ry., 120 N.C. 544, 26 S.E. 922 (1896). Appropriately, the death knell of the fellow servant rule was sounded by the Fusion general assembly of 1897, which abolished the rule. *See* Act of Feb. 23, 1897, ch. 56, § 1, 1897 N.C. Priv. Laws 83, 83 (codified at N.C. GEN. STAT. § 62-242 (1982)).

191. *See, e.g.*, Ward v. Odell Mfg. Co., 123 N.C. 248, 31 S.E. 495 (1898) (child laborer injured at job); Sims v. Lindsay, 122 N.C. 678, 30 S.E. 19 (1898) (child laborer injured by machinery at steam laundry); Haynes v. Raleigh Gas Co., 114 N.C. 203, 19 S.E. 344 (1894) (child killed by electrical current passing through wire on sidewalk). By 1900 the kinds of disputes that had elicited the first modern negligence rules—livestock and other property damage disputes—were a minor fraction of the total number of negligence cases. *See* Tables 6 & 7.

earlier courts in both areas. Two cases—one focusing on causation, and another reflecting policy considerations—illustrate the point.

McLamb v. Wilmington & Weldon Railroad[192] recognized what was called "continuing negligence."[193] Plaintiff's intestate, stranded on a thirty-foot trestle, was struck and killed by defendant's train.[194] The primary question, after plaintiff admitted negligence, was whether defendant's engineer could have avoided the accident.[195] The engineer apparently did nothing in the forty-five seconds between seeing the victim and running over him.[196] Justice Douglas, writing for the court, found defendant liable:

> If the negligence of the defendant, even if it preceded the negligence of the deceased, were such as to mislead the deceased, and induce or permit him unknowingly to take such risk as otherwise he would not incur, then the negligence of the defendant would *continue* in its natural results up to the moment of the accident, and would be the proximate cause of the injury.[197]

Justice Douglas, unlike his prorailroad predecessors, did not emphasize the right of railroads to the absolute use of their tracks or the defendant's prerogative to assume the reasonableness of the plaintiff. Instead, he argued that if there was "any probability of danger," the engineer ought to have reduced his speed.[198] He reasoned that "so much [was] due to the sanctity of human life."[199]

Another example demonstrating the changed values of the court was *Troxler v. Southern Railway*.[200] Plaintiff was a railway employee who received injuries primarily because the company had failed to provide automatic car couplers.[201] Justice Clark[202] wrote an opinion that consisted mostly of a lecture to railroads on their duty to the public and to their employees. He argued that it was negligence per se "for the master to expose his servant to the hazard of life or limb."[203] Such protection was required "unless economy of expenditures . . . is to be deemed superior to the conservation of lives and limbs of those employed in their operation."[204] Justice Clark criticized those "who entertain sentiments of higher allegiance to the net earnings of the [railroad] syndicates . . . than to

192. 122 N.C. 862, 29 S.E. 894 (1898).
193. *Id.* at 873-74, 29 S.E. at 896.
194. *Id.* at 863, 29 S.E. at 895.
195. *See id.* at 874-76, 29 S.E. at 898.
196. *Id.* at 875-76, 29 S.E. at 898.
197. *Id.* at 874, 29 S.E. at 898.
198. *Id.* at 875, 29 S.E. at 898.
199. *Id.*
200. 124 N.C. 189, 32 S.E. 550 (1899).
201. *Id.* at 191, 32 S.E. at 550.
202. Justice Walter Clark became one of the leading American reformist judges of the early twentieth century. *See* A. BROOKS, WALTER CLARK: FIGHTING JUDGE 85-101 (1944); Whichard, *A Place for Walter Clark in the American Judicial Tradition*, 63 N.C.L. REV. 287, 295-98 (1985).
203. *Troxler*, 124 N.C. at 192, 32 S.E. at 550. Justice Clark described this negligence as continuing negligence of a sort that "no contributory negligence . . . will discharge the master's liability." *Id.* at 191, 32 S.E. at 550.
204. *Id.* at 192, 32 S.E. at 550.

those great principles which every political party professes to advocate, as being for the best interests of the public."[205] The court, reflecting prevailing political sentiment, had moved away from the version of negligence posited by the court in the 1880s.

Previously articulated theories[206] of tort development cannot explain the operation of negligence law in nineteenth-century North Carolina. The prodefendant decisions of the Whig and conservative Democratic courts[207] suggest the deficiencies of Schwartz' "fairness" perspective[208] and White's intellectual history approach.[209] Moreover, Horwitz' neo-Marxist conclusions[210] are challenged in particular by the proplaintiff decisions of the Fusion court, which was composed of capitalistic reformers.[211] In short, by studying closely the relationship between political change and legal fault in nineteenth-century North Carolina, some revision of wholesale emphasis on intellectual, economic, or "fairness" theories is necessary.[212] Obviously jurists such as Ruffin, Reade, Smith, and Clark were not equally influenced by a willingness to recognize judicial "norms," subsidize railroads, or achieve an identical "economic efficiency." Indeed, this Note demonstrates that, at least in North Carolina, there was no single judicial response to tort law in the nineteenth century, particularly in the important area of personal injury disputes. "Reform" periods—Reconstruction, and especially Fusion—witnessed a decided shift both in doctrine and in results favorable to plaintiffs. Whigs and Bourbon Democrats seemed more inclined to support defendant railroads. Negligence rules, although initially devised by those in favor of railroad development, were flexible enough that courts shaped and interpreted them over time to bring about decidedly different results.

Changes in the operation of tort law in North Carolina were linked directly to the shifting fortunes of political parties. North Carolina's five major political parties between 1830 and 1900 represented diverse attitudes toward railroads and industrialization.[213] The reasons that railroads were so important to poli-

205. *Id.* at 196-97, 32 S.E. at 552. Justice Clark's Civil War experience prompted him to compare the 298 killed and 1,645 wounded in the Spanish-American War with the 1,693 killed and 27,667 "wounded" in 1897 in railroad employment. *Id.* at 192, 32 S.E. at 551.

206. *See supra* text accompanying notes 5-20.

207. *See supra* text accompanying notes 70-101 & 154-169.

208. *See supra* text accompanying notes 19-20.

209. *See supra* text accompanying note 18.

210. *See supra* text accompanying note 13.

211. *See supra* text accompanying notes 173-91. For a recent evaluation of the Populists as proponents of reform within capitalism, see N. POLLACK, THE JUST POLITY (1987).

212. This Note recognizes that each of these factors played a role in the development of tort law. Indeed, despite decided fluctuations in the court's behavior, there appear to have been many cases in each period in which the outcome was fairly certain. It was probably in the "hard" cases that political perspective made the greatest difference. Of course, this Note also has argued that in the nineteeth century North Carolina negligence law often was based on such vague rules that the "hard" cases appeared at least as often as the "easy" ones. By shifting its views on competing interests and by altering its doctrine, the court was able to create "hard" cases out of "easy" facts. Table 8 summarizes the outcomes of railroad cases between 1840 and 1899.

213. Between 1840 and 1895 only a few cases appeared that arose out of other industrial contexts. These decisions were so limited that they did not reveal a definite pattern of reasoning or outcome. In North Carolina, then, there is no clear evidence that negligence law was used as a general subsidy to textile mills, mines, or other such operations.

tics, economics, and tort law are obvious. The railroad was the first and most important large industrial force in North Carolina. In contrast to some northern states, other significant industries failed to develop until well after the Civil War.[214] Railroads also provided a deep pocket for plaintiffs. Finally, railroads impacted on the larger public, as common carriers spread across the State in a way an isolated textile mill could not. The connection between negligence law and railroad politics in North Carolina suggests that the history of tort law, and perhaps other kinds of law, should begin to take account of the interrelationship between private law and specific political developments. More widespread recognition of this connection would contribute to a better understanding of American law.

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214. H. LEFLER & A. NEWSOME, *supra* note 22, at 450.

APPENDIX

TABLE 1. NEGLIGENCE DECISIONS, 1840-1863 (RAILROADS AS DEFENDANTS)

Interest Injured	Successful Litigant	
	Plaintiff	Defendant
Slaves	1	6
Livestock	3	3
Other Property	3	4
Total Personal Injury	1	6
Total Property Damage	6	7
Total	7	13

TABLE 2. NEGLIGENCE DECISIONS, 1840-1863 (NONRAILROAD DEFENDANTS)

Interest Injured	Successful Litigant	
	Plaintiff	Defendant
Slaves	0	4
Livestock	2	2
Other Property	11	5
Total Personal Injury	0	4
Total Property Damage	13	7
Total	13	11

TABLE 3. NEGLIGENCE DECISIONS, 1869-1879 (RAILROADS AS DEFENDANTS)

Interest Injured	Successful Litigant	
	Plaintiff	Defendant
Railroad Employees	2	2
Other Personal Injury	1	2
Livestock	4	5
Other Property	5	6
Total Personal Injury	3	4
Total Property Damage	9	11
Total	12	15

TABLE 4. NEGLIGENCE DECISIONS, 1879-1894
(RAILROADS AS DEFENDANTS)

Interest Injured	Successful Litigant	
	Plaintiff	Defendant
Railroad Employees	8	18
Other Personal Injury	16	25
Livestock	9	7
Other Property	9	11
Total Personal Injury	24	43
Total Property Damage	18	18
Total	42	61

TABLE 5. NEGLIGENCE DECISIONS, 1879-1894
(NONRAILROADS AS DEFENDANTS)

Interest Injured	Successful Litigant	
	Plaintiff	Defendant
Employees	0	2
Other Personal Injury	3	2
Livestock	0	0
Other Property	15	7
Total Personal Injury	3	4
Total Property Damage	15	7
Total	18	11

TABLE 6. NEGLIGENCE DECISIONS, 1895-1899
(RAILROADS AS DEFENDANTS)

Interest Injured	Successful Litigant	
	Plaintiff	Defendant
Railroad Employees	17	7
Other Personal Injury	24	11
Livestock	3	2
Other Property	6	4
Total Personal Injury	41	18
Total Property Damage	9	6
Total	50	24

TABLE 7. NEGLIGENCE DECISIONS, 1895-1899
(NONRAILROADS AS DEFENDANTS)

Interest Injured	Successful Litigant	
	Plaintiff	Defendant
Employees	3	0
Other Personal Injury	8	4
Livestock	0	0
Other Property	1	0
Total Personal Injury	11	4
Total Property Damage	1	0
Total	12	4

TABLE 8. PERCENTAGES OF LITIGANT SUCCESS, 1840-1899
(RAILROAD CASES)

Years	Personal Injury			All Decisions		
	Plaintiff	Defendant	(n)	Plaintiff	Defendant	(n)
1840-1863	14%	86%	(7)	35%	65%	(20)
1869-1879	43	57	(7)	44	56	(27)
1879-1894	36	64	(67)	41	59	(103)
1895-1899	69	31	(59)	68	32	(74)