

# WORSE THAN PIRATES OR PRUSSIAN CHANCELLORS: A STATE'S AUTHORITY TO OPT-OUT OF THE QUID PRO QUO

## I. INTRODUCTION

Privatization<sup>1</sup> of public law dispute resolution in workplaces has been under intense scrutiny in recent years, most frequently in the context of arbitration.<sup>2</sup> Whether one agrees or disagrees with compulsory arbitration of workplace claims, its existence is no longer remarkable.<sup>3</sup> Yet, it might be surprising to some that compulsory arbitration has expanded beyond workplace disputes to tort claims and personal injury actions. A close reading of the Supreme Court's startling<sup>4</sup> 2012 opinion in *Marmet Health Care Center v. Brown*,<sup>5</sup> in which the Court unanimously announced, in a *per curiam* opinion, that personal injury and wrongful death suits are covered by the Federal Arbitration Act,<sup>6</sup> suggests that the scope of arbitration will likely expand.<sup>7</sup> As important as the policies and values inherent in employment law may be, the law of personal injury is older, even ancient.<sup>8</sup> Tort values are difficult to square with notions of arbitration contracts or of the waiver of

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<sup>1</sup> EEOC Notice No. 915.002, Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, § V (1997) (arguing that compulsory arbitration privatizes governmental anti-discrimination enforcement) *available at* <http://www.eeoc.gov/policy/docs/mandarb.html>

<sup>2</sup> *See e.g.* Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. Times, Nov. 1, 2015 *available at* [http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?\\_r=1](http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=1)

<sup>3</sup> *See generally* IMRE SZALAI, *OUTSOURCING JUSTICE, THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (Carolina Academic Press 2013)

<sup>4</sup> Readers believing that people entering into arbitration agreements read or understand what they are entering into may not have been startled by the opinion. Others might have sympathy with the West Virginia Supreme Court's view that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." *Brown v. Genesis Healthcare Corp.*, No. 35494 (W. Va., June 29, 2011),

<sup>5</sup> 132 S.Ct. 1201 (2012)

<sup>6</sup> The Federal Arbitration Act ("FAA") federalizes agreements to arbitrate. If a court concludes that such an agreement exists it will as a matter of federal law enforce it and dismiss or hold in abeyance court suits filed on the merits of disputes even arguably within the agreement's ambit. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)

<sup>7</sup> *Id.* at 1203 ("The statute's text includes no exception for personal-injury or wrongful-death claims. It 'requires courts to enforce the bargain of the parties to arbitrate.'") (internal citation omitted). It is worth noting that the American Bar Association had taken a formal position against the type of pre-injury waivers of wrongful death claims that were at issue in *Marmet*. *See* ABA HOUSE OF DELEGATES ADOPTION OF FEBRUARY 16, 2009 *available at* [http://www.americanbar.org/content/dam/aba/directories/policy/2009\\_my\\_111b.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2009_my_111b.authcheckdam.pdf)

<sup>8</sup> Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L. J. 1127, 1128 (1990):

Judges from the seventeenth century in England to the nineteenth century in the United States expressed in their tort decisions the same policies, the same values, and the same principles. They used tort law to make people behave in morally appropriate ways by holding them to community standards of reasonable behavior in the circumstances in order to minimize injuries and losses, and to promote honesty and fairness in economic relationships. In certain kinds of cases, these principles led judges to hold defendants strictly liable.

rights in employment or commercial contexts.<sup>9</sup> A requirement that an employee—or anyone—must compromise the right to a personal injury lawsuit before understanding the nature or extent of a subsequently suffered injury is disquieting. The American Arbitration Association has frequently declined to conduct arbitrations based on pre-injury agreements to arbitrate medical malpractice cases.<sup>10</sup> Even during the peak of industrialism, not far removed in time from *Lochner*, some late 19<sup>th</sup> century courts refused to enforce pre-injury waivers of tort suits—the exclusive cause of action for workplace injury prior to the early twentieth century—by employees against their employers.<sup>11</sup>

Another kind of workplace dispute privatization is presently underway in several states.<sup>12</sup> In connection with century-old workers' compensation laws—the successors to tort laws and especially to the law of negligence,<sup>13</sup> one state has implemented,<sup>14</sup> and others are considering,<sup>15</sup> a dispute resolution model in which employers are authorized to opt-out of coverage by workers' compensation statutes. "Alternative benefit plans," created under opt-out statutes,<sup>16</sup> permit employers to, among other things, designate private workers' compensation fact finders,<sup>17</sup> whose findings of fact are subjected to highly deferential judicial review.<sup>18</sup> This model is arbitration on steroids. While there may be doubts in some quarters about the neutrality of arbitrators,<sup>19</sup> reasonable doubts about the loyalties of an employer-appointed fact-finder are inevitable.<sup>20</sup>

Preliminarily it might be argued that an employer's opting out of coverage by a workers' compensation statute is acceptable if employees have knowingly signed pre-injury waivers of workers' compensation benefits. Leaving to one side whether such a waiver would ever tend to be

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<sup>9</sup> Elizabeth G. Thornburgh, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW AND CONTEMPORARY PROBLEMS 253, 273 (2004) ("At the extreme, unrestrained enforcement of arbitration clauses could make all tort policy considerations disappear altogether.").

<sup>10</sup> See *Crossman v. Life Care Centers of America*, 225 N.C. App. 1, 4 (2013); *Dean v. Heritage Healthcare of Ridgeway*, 408 S.C. 371, 378-79 (2014).

<sup>11</sup> *Johnson v. Philadelphia & RR. Co.*, 163 Pa. St. 127 (1894).

<sup>12</sup> See *infra*. Part III

<sup>13</sup> See *infra*. Part II.

<sup>14</sup> See *infra*. Part III.B

<sup>15</sup> Tennessee and South Carolina newspaper cites

<sup>16</sup> See *infra*. Part III.A and B

<sup>17</sup> See *e.g.* the Oklahoma Injury Benefit Act which states,

The claimant may appeal in writing an initial adverse benefit determination to an appeals committee within one hundred eighty (180) days following his or her receipt of the adverse benefit determination. The appeal shall be heard by a committee consisting of at least three people that were not involved in the original adverse benefit determination. The appeals committee shall not give any deference to the claimant's initial adverse benefit determination in its review.

Oklahoma St. Title 85A §211(B)(1)

Thus, the employer may appoint as fact finder *any* three individuals who "were not involved in the original adverse benefit determination."

<sup>18</sup> See *infra*. Part III.B.

<sup>19</sup> See generally Colvin, A. J. S. (2011). *An empirical study of employment arbitration: Case outcomes and processes*. JOURNAL OF EMP. L. STUDIES, 8(1), 1-23

<sup>20</sup> "Not only is a biased decisionmaker constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (internal citations omitted).

knowing, experience in Texas, the largest opt-out state,<sup>21</sup> has shown that employers frequently make no attempt to have their employees sign waivers.<sup>22</sup>

Workers' compensation law generally limits employees to workers' compensation benefits in lieu of tort damages for personal injuries suffered in the workplace, a principle known as "the exclusive remedy rule."<sup>23</sup> In states both retaining the exclusive remedy rule and allowing employers to opt-out of the workers' compensation system, employees of opt-out employers are left with no legal remedy for workplace injury. Admittedly employees acquiescing to mandatory arbitration of other employment claims are often in similar straits. However, workers' compensation opt-out potentially leaves employees even more vulnerable,<sup>24</sup> both because of the possible scope and magnitude of injury claims,<sup>25</sup> and because of employers' legally-conferred discretion to choose dispute fact finders.<sup>26</sup>

This article discusses both opt-out and also a type of incremental erosion of workers' compensation benefits transpiring in some states. More broadly, the article concerns "tort reform." At times the article discusses interchangeably state legislative remedial limitations of tort and workers' compensation because the two bodies of law each concern state law remedies for personal, and especially physical, injury. Thus, while this article is about the somewhat novel workers' compensation opt-out phenomenon, it is also more broadly about the authority of states to curtail the right to a remedy for personal injury. The question has come up repeatedly in recent decades in contexts like "tort reform,"<sup>27</sup> "medical malpractice reform,"<sup>28</sup> and the application of state statutes of repose to bar tort claims.<sup>29</sup> In short, the question of the limits of state interference with tort remedies comes up whenever legislatures attempt to decrease plaintiff tort compensation.<sup>30</sup> Virtually the same questions are implicated by workers' compensation reform because workers' compensation rights have been, from their inception, explicitly derived from tort

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<sup>21</sup> See *infra*. Part III.

<sup>22</sup> Although dated, figures from 2001 showed that only about 7% of opt-out employers required their employees to sign waivers. TEXAS MONITOR 6:4 Winter 2001, *Liability Waivers*, RESEARCH AND OVERSIGHT COUNCIL ON WORKERS' COMPENSATION, available at <http://www.tdi.texas.gov/pubs/wcreg/mon6-4waiver.html>

<sup>23</sup> See MICHAEL C. DUFF, *WORKERS' COMPENSATION LAW* 326 (Carolina Academic Press 2013)

<sup>24</sup> For an excellent introduction to opt-out see Michael Grabell, ProPublica, and Howard Berkes, NPR, *Inside Corporate America's Campaign to Ditch Workers' Comp*, PROPUBLICA|INSULT TO INJURY, Oct. 14, 2015 available at <https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp>.

<sup>25</sup> In 2014, private industry reported three million nonfatal workplace injuries and illnesses, a rate of roughly 3.2 cases per 100 full-time workers. Bureau of Labor Statistics, *Employer-Reported Workplace Injury and Illness Summary*, Oct. 29, 2015, available at <http://www.bls.gov/news.release/osh.nr0.htm>

<sup>26</sup> See *supra*, n.17 & 18 and accompanying text. In Texas and Oklahoma, employers are able to combine opt-out with arbitration. See *infra*. Part III.A & B.

<sup>27</sup> *Greist v. Phillips*, 906 P.2d 789, 795 (Or. 1995) (upholding \$500,000 statutory cap on awards of noneconomic damages in wrongful death actions on theory that plaintiff had received a substantial remedy).

<sup>28</sup> See *Carson v. Mauer*, 424 A.2d 825 (N.H 1980) (striking several provisions modifying tort law as applied to medical malpractice) see *infra*. Part IV.C.

<sup>29</sup> *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986)

<sup>30</sup> Typical legislative reforms have included measures capping damages and attorney fees, adopting shortened statutes of limitations or statutes of repose, increasing the difficulty of certifying class actions, mandating bifurcation or other means of restructuring trials, narrowing standards of liability, providing for close judicial review of jury findings, abolishing or limiting joint and several liability, and abolishing the collateral source rule. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 527 n.4 (2005).

rights.<sup>31</sup> Workers' compensation claimants stand in the historical shoes of torts plaintiffs.<sup>32</sup> Roughly speaking, opt-out implicates the complete elimination of a right to a remedy for workplace injury,<sup>33</sup> while the incremental erosion of rights concerns the adequacy of benefits. Debates over tort reform often involve tort caps, especially caps of non-economic damages, which is a question of adequacy. Workers' compensation benefits do not allow for the possibility of non-economic benefits, and it would be rare in the course of a tort reform debate for someone to propose that the amount of a plaintiff's damages be within the exclusive control of a tort defendant, but in essence that is what opt-out permits.<sup>34</sup>

The article proceeds according to the following plan. Part II provides workers' compensation history and context to assist with contextualizing legislative workers' compensation benefit reduction initiatives, including opt-out. Part III describes the roiling workers' compensation backdrop in three states: Texas and Oklahoma, because they are presently the only states with enacted opt-out statutes, thereby representing the most dramatic break to date with the historical workers' compensation model; and Florida, a state that has allegedly incrementally eroded its workers' compensation benefits to the point where the benefits are unreasonable or inadequate.<sup>35</sup> Part IV discusses the prospect of restraining state "tort reform" through "right to remedy," "open courts," or "*quid pro quo*" provisions in state constitutions. Part V discusses the possibility of restraining states through operation of federal due process principles first articulated by the Supreme Court in its seminal 1917 opinion in *New York Cent. R. Co. v. White*,<sup>36</sup> a case originally upholding the constitutionality of the American workers' compensation model. Part V argues that *White* may have been employing an early form of historical due process analysis. The argument contends that, even if *White* cannot be comprehended within the Supreme Court's historical due process modalities, principles of "structural due process" and "Lockean provisos" compel a conclusion that our legal order should find repugnant inadequate remedies for negligently-caused

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<sup>31</sup> Jean C. Love, *Actions for Non-Physical Harm: The Relationship between the Tort System and No Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857 (1985).

<sup>32</sup> Tort reform has come in waves.

In the first wave of retrenchment, businesses sought changes in rules of law, but . . . the general public, more so than courts, were the target of the efforts at persuasion . . . In the mid-80s, a second wave of increased insurance premiums hit multiple sectors, including the automotive and health care industries . . . As in the 1970s, state legislatures responded to a rapid rise in liability insurance rates by enacting measures that capped pain and suffering damages, limited punitive damages, restricted the collateral source rule, and modified or eliminated joint and several liability rules. In 1986 alone, forty-one of forty-six state legislatures enacted some type of tort reform measure . . . The effort to nationalize tort law can be seen as a "third wave" of tort retrenchment.

John T. Nockleby and Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021

<sup>33</sup> Texas, as will be seen, at *supra*. Part III.A, is the exception. Unlike Oklahoma, opt-out employers in Texas are liable in tort. As a practical matter, the tort right in Texas is eviscerated by compulsory arbitration *See infra*. Part III.B. Thus, it is the combination of opt-out and arbitration that has practically speaking killed workers' tort rights in Texas.

<sup>34</sup> The existing structures provide either for payment of the same "forms" of benefits (Oklahoma) or impose no duty on the employer to implement a plan with benefits (Texas). *See infra*. Part III.A and B.

<sup>35</sup> *See e.g.* *Stahl v. Hialeah Hosp.*, 160 So.3d 519 (Fla. 2015) *review granted* 2015 WL 6126944 (challenging as unconstitutional requirement that injured workers contribute to medical expense occasioned by work-related injury)

<sup>36</sup> 243 U.S. 188, 255 (1917); *accord* *Middleton v. Texas Power & Light Co.*, 249 U.S. 152 (1919).

physical injury or for accidental injury comprehended within the historical workers' compensation "Grand Bargain."

## II. WORKERS' COMPENSATION ESSENTIAL HISTORY AND PRESENT CONTEXT

The essential theory of workers' compensation law is straightforward. When a worker is injured compensation is swiftly and more or less automatically provided according to some pre-existing measure or schedule of benefits.<sup>37</sup> The idea is not new. In roughly the last third of the seventeenth century, the governing Articles of Captain Morgan's great pirate ships allowed that buccaneers wounded and maimed on voyages—presumably while plundering fat Spanish galleons—would be compensated according to a schedule of listed harms.<sup>38</sup> Thus one saw early glimmerings of the emergence of a workers' compensation insurance "system." By the nineteenth century, Otto von Bismarck had become an adherent of the view that workers injured in the course of employment ought to be compensated efficiently and humanely.<sup>39</sup> Bismarck's views were admittedly offered in the service of Christendom and born of a fierce opposition to socialism and communism; but they were nevertheless not what a contemporary person might expect from the chancellor of "blood and iron."<sup>40</sup> The idea of workers' compensation caught on across the then-industrializing late-nineteenth century world, and had spread to the United States by about 1910. The rudimentary concept was that negligence lawsuits would be "exchanged" for statutorily pre-determined benefits.<sup>41</sup> Workers with viable negligence claims would probably receive less compensation under a workers' compensation statute than they might have in tort.<sup>42</sup> But on average many more workers were likely to receive *some* compensation for work-related injuries under workers' compensation statutes than in negligence suits.<sup>43</sup> In negligence, workers were frequently defeated by affirmative defenses and ultimately received no compensation,<sup>44</sup> an outcome made much less likely through passage of workers' compensation statutes.

By 1917, the Supreme Court had held that a state legislature—New York's—could permissibly substitute workers' compensation benefits for tort remedies provided the substitution was not "repugnant to the provisions of the Fourteenth Amendment."<sup>45</sup> The Court was careful to emphasize that it did not have before it a case in which a state was attempting to "suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a

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<sup>37</sup> See e.g. *Tooley v. AK Steel Corp.*, 81 A.3d 851, 857 (Pa. 2013)

<sup>38</sup> STEPHAN TALTY, *EMPIRE OF BLUE WATER* 58-59 (Crown Publishers 2007); ALEXANDER O. EXQUEMELIN, *THE BUCCANEERS OF AMERICA* (1678) 2000. Translated by Alexis Brown. Mineola, New York: Dover pp. 71-72. *cited in* the NEW YORK STATE WORKERS' COMPENSATION BOARD CENTENNIAL BOOKLET at 7 *available at* [http://www.wcb.ny.gov/WCB\\_Centennial\\_Booklet.pdf](http://www.wcb.ny.gov/WCB_Centennial_Booklet.pdf)

<sup>39</sup> Otto Von Bismarck, *Practical Christianity* in *THE GERMAN CLASSICS, VOLUME X*, 221-243 (Kunko Francke ed. 1913) *available at* <http://www.unz.org/Pub/FranckeKuno-1913v10-00221>

<sup>40</sup> A.J. P. TAYLOR, *BISMARCK: THE MAN AND THE STATESMAN* 57 (Vintage Books 1967)

<sup>41</sup> See generally PRICE V. FISHBACK & SHAWN E. KANTOR, *PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION* 1-6 (University of Chicago Press 2000).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Affirmative defenses that became known as the "unholy trinity," assumption of the risk, contributory negligence, and the fellow servant rule. See DUFF, *WORKERS' COMPENSATION LAW* at 6

<sup>45</sup> *White, supra.*, 243 U.S. at 255. The logical corollary, of course, is that such a substitution could be repugnant.

reasonably just substitute.”<sup>46</sup> The substitute deemed adequate was payment to an injured worker of wage-loss indemnity benefits, payment for surgical and medical treatment associated with a workplace injury, and, in the event of work-related death, payment of funeral expenses and wage-loss benefits to the worker’s surviving family.<sup>47</sup> The Court recognized that the system would be operated by a public, state administrative commission.<sup>48</sup> These features, therefore, were implicitly deemed by the Court to be a reasonable substitute for a tort suit.

At the present historical moment the continued viability of the workers’ compensation tort substitute, the “quid pro quo,” endorsed by *White*, is in question. The two poles of argument in constant operation will be familiar to many readers. On the one hand, it might be argued that workers’ compensation laws are tantamount to “ordinary” common law rules, modifiable at will by a rational legislature.<sup>49</sup> On the other hand, it might be contended that the transition to workers’ compensation, a socially massive undertaking involving historically important remedies for personal injury, would not have been acceptable in the absence of a widespread understanding that substitute benefits under the system would continue to be available and “reasonable.”<sup>50</sup>

This debate is perplexing but not academic. Some state legislatures seem poised to authorize wholesale substitution of employer-created alternative benefit plans for workers’ compensation remedies.<sup>51</sup> As mentioned earlier in this article, Oklahoma, has already done so.<sup>52</sup> Apart from opt-out, other states have demonstrated a willingness to allow significant modifications of workers’ compensation rights by reducing the amount or duration of medical and wage-loss indemnity benefits.<sup>53</sup> Oklahoma’s abrupt embarkation on the opt-out route instantly generated litigation.<sup>54</sup> On the other hand, over time Florida has made significant but incremental reductions to its workers’ compensation benefits, provoking periodic litigation resistance.<sup>55</sup> The Florida model of incremental erosion is not unique. *The Demolition of Workers’ Comp*,<sup>56</sup> a recent, much-discussed article produced jointly by ProPublica and National Public Radio, contends that, “Over the past decade, state after state has been dismantling America’s workers’ comp system with disastrous

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<sup>46</sup> *Id.* at 201 (emphasis supplied). The logical corollary is that such a sudden set-aside without a “reasonably just substitute” could be problematic, though on what Fourteenth Amendment theory readily applicable in 1917 it is not clear.

<sup>47</sup> *Id.* at 192-193.

<sup>48</sup> *Id.* at 194

<sup>49</sup> See *Munn v. People of State of Illinois*, 94 U.S. 113 (1876).

<sup>50</sup> See generally *Smothers v. Gresham Transfer*, 23 P.3d 333 (Or. 2001) see *infra*. Part IV.

<sup>51</sup> See *supra*. at 1; see also Michael Grabell, PROPUBLICA, and Howard Berkes, NPR, *Inside Corporate America’s Campaign to Ditch Workers’ Comp*, Oct. 14, 2015 available at [https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp?utm\\_source=et&utm\\_medium=email&utm\\_campaign=dailynewsletter&utm\\_content=&utm\\_name=](https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp?utm_source=et&utm_medium=email&utm_campaign=dailynewsletter&utm_content=&utm_name=) [See hereinafter Grabell & Berkes, *Campaign to Ditch*]

<sup>52</sup> See also *infra*. Part III.B.

<sup>53</sup> See Emily A. Spieler, and John F. Burton Jr., *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers’ Compensation Benefits*, 55 AM. J. OF IND. MED., 487, 498-504 (2012) (discussing benefit reductions and other obstacles to employee pursuit of legitimate workers’ compensation claims)

<sup>54</sup> See *infra*. Part III.B. see generally *Coates v. Fallin*, 316 P.3d 924 (Ok. 2013)

<sup>55</sup> See *infra*. Part III.C. See generally *Padgett v. State of Florida*, 2014 WL 6685226 (Fla.Cir.Ct.) (dismissed on procedural grounds)

<sup>56</sup> Michael Grabell and Howard Berkes, *The Demolition of Workers’ Comp*, PROPUBLICA & NPR, March 4, 2015 available at <https://www.propublica.org/article/the-demolition-of-workers-compensation> (last accessed April 10, 2015) [hereinafter Grabell & Berkes, *Demolition*]

consequences for many of the hundreds of thousands of people who suffer serious injuries at work each year.”<sup>57</sup>

On the contemporary opt-out front, the popular press has reported that a corporate-funded lobbying group called the Association for Responsible Alternatives to Workers’ Compensation (“ARAWC”), “told an insurance journal . . . that the corporations ultimately want to change workers’ comp laws in all 50 states.”<sup>58</sup> On its website ARAWC refers to Tennessee as a “target state.” An “Employee Injury Benefit Alternative” was introduced in the Tennessee senate in 2015 but did not pass.<sup>59</sup> ARAWC’s materials suggest that it has national ambitions,<sup>60</sup> and South Carolina appears to be the group’s next target of opportunity.<sup>61</sup>

All observers of workers’ compensation reform acknowledge that its overall purpose is to save businesses money,<sup>62</sup> so ultimately the essential issue is the legal limit of business subsidization by the states. A business environment without rules—without workers’ compensation or tort—is obviously a much cheaper place to operate, and it is apparent that the opt-out movement has its sights set on elimination of an employer’s obligation to pay *permanent* incapacity benefits.<sup>63</sup> The

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<sup>57</sup> *Id.*

<sup>58</sup> Molly Redden, *Walmart, Lowe’s, Safeway, and Nordstrom Are Bankrolling a Nationwide Campaign to Gut Workers’ Comp*, MOTHER JONES, Mar. 26, 2015 available at <http://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation> (last accessed April 10, 2015) citing Stephanie K. Jones, *Group Aims to Create Alternatives to Workers’ Comp State-by-State*, INSURANCE JOURNAL, November 10, 2014 available at <http://www.insurancejournal.com/news/national/2014/11/10/346291.htm> (last accessed April 10, 2015), see also Grabell & Berkes, *Inside Corporate America’s Campaign*, supra., n.\_\_\_\_

<sup>59</sup> See SB 721, 2015-16 109<sup>th</sup> General Assembly. It is anticipated that the bill will be reintroduced with revisions in 2016. Amy O’Conner, *Tennessee Workers Comp Opt-Out Legislation Revised, Ready for Next Session*, INSURANCE JOURNAL, June 1, 2015 available at <http://www.insurancejournal.com/news/southeast/2015/06/01/370065.htm>. By all accounts, the proposed Tennessee bill is more extreme than Oklahoma’s statute. It “eliminates an entire genre of benefits. Indeed, the bill’s mandated plan benefits do not provide for any permanency benefits: No permanent partial or permanent total benefits. It eliminates lifetime medical benefits, capping medical at \$300,000, thereby jeopardizing treatment of workers with the most serious injuries. Nor are there funeral benefits, nor for ancillary benefits common in workers’ compensation systems—van and home modification, custodial care, hearing aids, and artificial limbs. STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION: LEGISLATION PERMITTING EMPLOYER OPT-OUT OF THE TENNESSEE WORKERS’ COMPENSATION SYSTEM at 2-3 in David B. Torrey, *The Opt-Out of Workers’ Compensation Legislation in the Southern States*, Address at MCLE|New England, Boston, Massachusetts (Nov. 20, 2015) available at [http://www.davetorrey.info/files/Torrey.MCLE.\\_Mass\\_Opt-out.10.26.15final.pdf](http://www.davetorrey.info/files/Torrey.MCLE._Mass_Opt-out.10.26.15final.pdf)

<sup>60</sup> From the group’s website:

The Association for Responsible Alternatives to Workers’ Compensation (ARAWC) is a national organization formed to advocate for a system that will deliver better medical outcomes to injured workers and give employers a choice in how they will manage employee benefits. ARAWC was formed in 2013 and advocates before state legislatures to allow employees and employers to benefit from an Option, as some states already allow.

<sup>61</sup> Amy O’Conner, *South Carolina Jumps Aboard Workers’ Comp Alternative Bandwagon*, INSURANCE JOURNAL, June 10, 2015 available at <http://www.insurancejournal.com/news/southeast/2015/06/10/371088.htm>.

<sup>62</sup> WORKERS’ COMPENSATION OPT-OUT: CAN PRIVATIZATION WORK?, NEW STREET GROUP/SEDGEWICK 2012 available at <https://www.sedgwick.com/docs/pressrelease/WCOpt-OutStudy.pdf>. Opt-out proponents complain that the system has become too expensive because employers lack control over provider selection, enforcement of “evidence-based” medicine is insufficient, pharmaceutical abuse and use of opioids has been inadequately curtailed, the complexity of terminating temporary disability is excessive, permanent partial disability awards have been pervasive, and dispute resolution procedures are expensive and cumbersome. *Id.*

<sup>63</sup> With respect to the elimination of permanent incapacity benefits see *infra*. n.355, and accompanying text. 2012, the direct costs of workers’ compensation injuries was roughly \$60 billion. See Liberty Mutual Research Institute,

question is whether there are any constitutional limitations on that subsidization, any limit on legislative privatization of public rights. In the workers' compensation context *White* once appeared to require that tort substitutions for workplace injury be "reasonably just" to pass judicial muster.<sup>64</sup> If none of *White* remains viable, it may be a short road to judicial authorization of any legislative reduction of personal injury remedies, as states race to the bottom and the federal courts refuse to intervene. If money is the predominant measure of rationality, the lowest cost workers' compensation or tort system will always be at least rational.<sup>65</sup>

### III. A TALE OF THREE STATES: TEXAS, OKLAHOMA, AND FLORIDA

#### A. Texas

Texas, uniquely among the states,<sup>66</sup> has a workers' compensation system that has allowed employers to opt-out of the system entirely since its beginnings in the early twentieth century.<sup>67</sup> More precisely, while several other states initially enacted elective statutes like the one in Texas, all of them subsequently switched to compulsory systems.<sup>68</sup> Employers in Texas, including large employers, routinely opt-out.<sup>69</sup> What makes Texas paradigmatic is not its "new" approach but its perennial status as a deregulatory model. Critics of the Texas system allege that:

Most Texans who are outside the workers' comp system—more than a million people—do get private occupational insurance from their employers. But those plans aren't regulated by the state and can be crafted to sharply limit employees'

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Workplace Safety Index available at  
<http://www.libertymutualgroup.com/omapps/ContentServer?pagename=LMDGroup/Views/LMG&ft=4&fid=1240029010623&ln=en>

<sup>64</sup> See *White*, *supra*. n.28 and accompanying text

<sup>65</sup> Cf. Goldberg, *The Constitutional Status of Tort Law*, *supra*. n.32, at 626 ("Whatever its advantages, a society without a law for the redress of private wrongs may be a society more prone than ours to accept a relatively thin, Holmesian notion of legal obligation, a less robust civil society, and a more statist conception of how government interacts with its citizens.")

<sup>66</sup> Texas is not the only current opt-out state. Oklahoma, soon to be discussed, is the second such state. It may be technically correct to say that Oklahoma is not a "true" opt-out state because it formally requires employers to "comply" with its workers' compensation statute authorizing opt-out. The difference is semantical, however. As the article will describe, the statute provides employers *two* methods of not complying with the "traditional" law, opt-out and arbitration. See *infra*. Part III.B.

<sup>67</sup> In Texas, opt-out employers may either withdraw from the system entirely and "go bare" or establish an "alternative benefit plan" providing a form of putatively contractual benefits that need not conform in any manner to the statutory workers' compensation system. See *infra*. III.A.

<sup>68</sup> Initially, during the first two decades of the twentieth century, many workers' compensation statutes throughout the United States were elective. Thus, employers in several states were permitted to "not opt in," which was the functional equivalent of opting out. States structuring their statutes in this way did so out of concern that the U.S. Supreme Court would strike down compulsory workers' compensation systems on due process grounds. See PRICE V. FISHBACK & SHAWN E. KANTOR, PRELUDE TO THE WELFARE STATE at 93, 103

<sup>69</sup> COSTCO provides a ready example of a large employer taking advantage of the opportunity to provide a non-statutory injury reimbursement option. See New Street Group/Sedgwick, Workers' Compensation Opt-Out, Can Privatization Work?: The Texas Experience and the Oklahoma Proposal (November 2012) available at <https://www.sedgwick.com/NewsRelease/WCOpt-OutStudy.pdf> (last accessed August 3, 2014).

benefits, legal rights and health care choices. Only 41 percent of the plans include death benefits, for example, according to state surveys.<sup>70</sup>

Texas has been at or near the top of national workplace death rates in recent years.<sup>71</sup> Explanations abound as to why this is so.<sup>72</sup> Whatever the reasons, there have been dramatic industrial mishaps involving opt-out employers. For example, one of the underpublicized facts revealed during investigation of the devastating fertilizer facility explosion that rocked West, Texas in April 2013—a blast that registered 2.1 on the Richter scale<sup>73</sup>—was that the company running the plant was a “nonsubscriber,” an opt-out employer.<sup>74</sup> Although none of the plant’s workers were injured or killed in the blast,<sup>75</sup> the company would have suffered no heightened workers’ compensation expense had those workers become victims. Despite having the regular practice of storing the explosive substance ammonium nitrate on its premises, the plant was insured for only a million dollars. Damages following the accident were estimated at one-hundred million dollars.<sup>76</sup> Underdeterrence and underinsurance were, in other words, a pervasive feature of the plant’s operations, and opt-out was intertwined with the unsafe profile.<sup>77</sup>

One of the ameliorating features of the Texas opt-out system is that employees of opt-out employers retain the right to sue their employers in tort for workplace injuries. However, opt-out employers providing their employees an alternative benefit plan—a benefit not *required* under Texas law, which permits employers to “go bare” and provide no wage loss or medical benefits at all—may effectively require their employees to waive a tort suit and participate in arbitration as a condition of employment. While pre-injury waivers of the right to sue are forbidden under Texas law,<sup>78</sup> the Texas courts have held that the state may not prohibit the waivers when accompanied

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<sup>70</sup> Jay Root, *Hurting for Work*, THE TEXAS TRIBUNE, June 29, 2014 available at <http://apps.texastribune.org/hurting-for-work/> (last visited Jan. 6, 2016)

<sup>71</sup> See Bill Bowen, *As Workplace Deaths Fall Nationally, They Remain Stubbornly High in Texas*, THE DALLAS MORNING NEWS, September 15, 2012, available at <http://www.dallasnews.com/business/headlines/20120915-as-workplace-deaths-fall-nationally-they-remain-stubbornly-high-in-texas.ece> (last visited Jan. 6, 2016)

<sup>72</sup> See e.g. James Gordon, *Death on the Job: Texas Workers More Likely to Die Than Counterparts Elsewhere*, THE DALLAS MORNING NEWS, August 16, 2014 available at [http://res.dallasnews.com/interactives/2014\\_workplace/](http://res.dallasnews.com/interactives/2014_workplace/) (last visited Jan. 6, 2016)

<sup>73</sup> Ian Urbina, Manny Fernandez and John Schwartz, *After Plant Explosion, Texas Remains Wary of Regulation*, N.Y. TIMES, MAY 9, 2013 (last accessed August 18, 2014) available at <http://www.nytimes.com/2013/05/10/us/after-plant-explosion-texas-remains-wary-of-regulation.html?partner=rss&emc=rss&pagewanted=all> (last visited Jan. 6, 2016)

<sup>74</sup> Arthur D. Postal, *West Fertilizer Blast Spotlights Texas Workers Comp System, Okla. Legislation*, PROPERTY CASUALTY 360°, April 24, 2013 (last accessed August 18, 2014) available at <http://www.propertycasualty360.com/2013/04/24/west-fertilizer-blast-spotlights-texas-workers-com> (last visited Jan. 6, 2016)

<sup>75</sup> The explosion killed fifteen non-employees and injured 200 others. *Id.*; Postal, *West Fertilizer Blast*, *supra*.

<sup>76</sup> An amount a mere two-hundred and fifty thousand dollars higher than the seven hundred and fifty thousand dollars that is required for a company to insure a single egg truck on the roadways Doug J. Swanson and Reese Dunklin, *West Fertilizer Co. was Insured for Only \$1 Million, A Fraction of the Estimated Losses*, DALLASNEWS, May 3, 2013 (last accessed August 18, 2014) available at <http://www.dallasnews.com/news/west-explosion/headlines/20130503-west-fertilizer-co.-was-insured-for-only-1-million-a-fraction-of-the-estimated-losses.ece> (last visited Jan. 6, 2016)

<sup>77</sup> The West explosion obviously cannot be thought to reflect the erosion of a historically non-mandatory Texas system. However, because in Texas a non-subscriber is authorized *either* to develop an alternative plan regulated by ERISA or to “go bare” in hard economic times the incentive for underinsurance seems high.

<sup>78</sup> TEX. LAB. CODE ANN. § 406.033(e)

by a promise to arbitrate as a result of preemption by the Federal Arbitration Act.<sup>79</sup> As one commentator has noted,

[I]f an employer can secure waivers from its employees before injuries, it can effectively neutralize the threat of negligence suits. It can thus secure the principal benefit of a workers' compensation system, namely near immunity from employer's liability lawsuits, while at the same time providing stingy or no benefits to the employees in return.<sup>80</sup>

In Texas, opting out of the workers' compensation system requires only that an employer notify the Texas Workers' Compensation Division of the Department of Insurance of opt-out status and inform employees at the time of hire of that status. An employer must also conspicuously post notices of its opt-out status in the workplace.<sup>81</sup> In 2014, thirty-three percent of Texas employers opted out of the workers' compensation system.<sup>82</sup> An estimated twenty percent of Texas private-sector employees (representing approximately 1.9 million employees in 2014) worked for non-subscribing employers.<sup>83</sup> In 2014, two-thirds of opt-out employers, or about twenty-two percent of Texas employers, provided no alternative benefit plan.<sup>84</sup> However, because Texas opt-out employers providing alternative benefit plans tend to be large they employ seventy-five percent of the opt-out employee population.<sup>85</sup> Thus, in Texas 25% of the 1.9 million opt-out employees—or 475,000 employees—are covered neither by alternative benefit plans nor by the workers' compensation statute.

Concerning the alternative benefit plans for those who are covered by such mechanisms, employers have no obligation to match or even approach the level of statutory workers' compensation benefits that would otherwise be required by law.<sup>86</sup> In the words of former Chief Justice Hardberger of the Texas Fourth Court of Appeals,

A nonsubscribing employer has unfettered discretion in determining the amount of benefits it will provide employees under an alternative plan. In exchange for these benefits, regardless of how minimal, the worker is prevented from presenting his claims to a jury by being required either to waive his right to sue or to submit his claims to binding arbitration. This is unacceptable.<sup>87</sup>

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<sup>79</sup> More precisely, the FAA would require a court to grant a motion to compel arbitration and either dismiss or hold in abeyance a post-injury law suit. On the ever encroaching phenomenon of arbitration *see* Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L. J. 2940 (2015)

<sup>80</sup> Jason Ohana, *Texas Elective Workers' Compensation: A Model of Innovation*, 2 WM & MARY BUS. L. REV. 323, 355 (2011)

<sup>81</sup> TEX. LAB. CODE ANN. § 406.002(a)

<sup>82</sup> SETTING THE STANDARD: AN ANALYSIS OF THE IMPACT OF THE 2005 LEGISLATIVE REFORMS ON THE TEXAS WORKERS' COMPENSATION SYSTEM, 2014 RESULTS, TEXAS DEPARTMENT OF INSURANCE 118

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Phil Hardberger, *Texas Workers' Compensation: A Ten Year Survey – Strengths, Weaknesses, and Recommendations*, 32 ST. MARY'S L.J. 1, 7 (2000)

<sup>87</sup> *Id.* *See also* Ohana, *Texas Elective Workers' Compensation*, *supra*. 341-42:

Of the 52 percent of non-subscribing employers that paid occupational injury benefits in 2008, only 70 percent covered medical costs. Of those that covered medical costs, 63 percent covered expenses

Under the Texas system of workers' compensation arbitration, figures show that employers require their employees to sign an arbitration agreement encompassing personal injury before an injury has occurred, that three quarters of employers requiring arbitration knew the arbitrator who presided at arbitration hearings, and that in half of those instances the arbitrator was employed by the employer.<sup>88</sup>

On the basis of all these patchwork features it could be reasonably questioned whether workers' compensation actually exists in Texas as a rights-based system. However, because Texas never accepted a compulsory workers' compensation system, it is difficult to contend that a societal Grand Bargain was breached. Both employers and employees have been able to opt out of Texas workers' compensation from its inception. To the extent that employees are denied the opportunity for a reasonable remedy for workplace injury, the question of whether the Texas system is constitutionally adequate remains open. On the one hand, negligence suits remain available to employees of opt-out employers. On the other hand, this raises the specter of the cumbersome, expensive tort system replete with the affirmative defenses that was the spur for the creation of workers' compensation in the first place. At the same time, operation of compulsory arbitration makes it extremely uncertain that an injured worker could make it to trial.

## B. Oklahoma

Oklahoma is the most recent state to have adopted a workers' compensation system authorizing opt-out.<sup>89</sup> Unlike Texas, Oklahoma requires employers either to formally participate in the state's traditional worker's compensation system, by obtaining insurance or becoming self-insured, or to submit for state approval an alternative benefit plan.<sup>90</sup> Thus, employers in Oklahoma may not "go bare."<sup>91</sup>

In Oklahoma, however, employees compelled to participate in alternative benefit plans continue to be bound by the exclusive remedy rule.<sup>92</sup> Thus, unlike the situation in Texas, Oklahoma workers participating in an alternative benefit plan, and therefore not entitled to workers'

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for as long as they were medically necessary, while the remaining 37 percent capped medical expenses either with a dollar limit, a time limit, or both. Applying these percentages to the larger universe of non-subscribers, the total percentage of non-subscribers that provided a medical expense benefit to injured employees in 2008 was approximately 36 percent, with approximately 23 percent of non-subscribers providing benefits for as long as medically necessary and 13 percent providing benefits up to a time or dollar limit. The numbers are similar for wage replacement benefits. Approximately 35 percent of all non-subscribers paid occupational injury benefits and 68 percent of those non-subscribers paid wage replacement benefits in 2008. Of these, 57 percent paid wage replacement benefits for the entire duration of the employee's lost time; the remaining 43 percent paid wage replacement benefits subject to a durational or dollar limit. Again, applying these percentages to the larger universe of non-subscribers, only about 20 percent of non-subscribers provided wage replacement benefits for the entire duration of their employees' lost time.

<sup>88</sup> Ohana, *Texas Elective Workers' Compensation*, *supra* n.80, at 344.

<sup>89</sup> See e.g. *Pilkington v. Doak*, Supreme Court No. 113,662 (Ok. 2015) (review denied)

<sup>90</sup> See 85A O.S. §§ 3, 202.

<sup>91</sup> They may, however, enter into agreements with employees to arbitrate workers' compensation claims under discrete section of the Workers' Compensation Act called, "The Workers' Compensation Arbitration Act." 85A O.S. §300 et seq.

<sup>92</sup> 85A O.S. §209(A)

compensation benefits, are also not entitled to bring tort suits.<sup>93</sup> This presents a rather stark *quid pro quo* problem because the original rationale for relinquishment of tort rights was the reciprocal conferral on employees of generous workers' compensation benefits. Oklahoma employees of opt-out employers have lost a functional legal right to a remedy for workplace injury.<sup>94</sup> Like the situation in Texas, generally workers' compensation benefits may not lawfully be waived under the Oklahoma Act.<sup>95</sup> However, also as in Texas, employers may enter into agreements with employees waiving workers' compensation benefits in lieu of arbitration,<sup>96</sup> and such agreements are probably enforceable under the Federal Arbitration Act.<sup>97</sup>

Some background is required to grasp these developments. In 2013, the Oklahoma legislature abrogated the former Workers' Compensation Code<sup>98</sup> and replaced it with three interrelated statutes, the Administrative Workers' Compensation Act,<sup>99</sup> the Employee Injury Benefit Act,<sup>100</sup> and the Workers' Arbitration Compensation Act.<sup>101</sup> The second of these statutes, the Injury Benefit Act, would allow "certain employers to adopt and administer benefit plans consistent with the Administrative Act, and the Workers' Arbitration Compensation Act."<sup>102</sup> However, appeals of benefit determinations under the Injury Benefit Act are made to a private employer internal adjudication committee rather than to a state or other public official.<sup>103</sup> Following internal review of the committee decision, an aggrieved employee may appeal to the state Workers' Compensation Commission, which acts as the "court of competent jurisdiction under 29 U.S.C.A. Section 1132(e)(1), and shall possess adjudicative authority to render decisions in individual proceedings by claimants to recover benefits due to the claimant under the terms of the claimant's plan, to enforce the claimant's rights under the terms of the plan, or to clarify the claimant's rights to future benefits under the terms of the plan."<sup>104</sup> This requirement assumes that any occupational injury

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<sup>93</sup> *Id.*

<sup>94</sup> The counter to this contention is that employers may be bound to comply with the terms of the alternative plans they do provide if the plans are covered by ERISA. This amounts as a practical matter to a requirement that an employer comply with a plan the terms of which it unilaterally determines, which is not an obligation comporting with usual conceptions of a "right."

<sup>95</sup> 85A O.S. §8.

<sup>96</sup> 85A O.S. §304

<sup>97</sup> The U.S. Supreme Court has not directly ruled on the question. *See e.g.* *Morales v. Odyssey Healthcare, Inc.*, 562 U.S. 895 (2010) (cert. denied). *See* plaintiff's brief On Petition for Writ of Certiorari, 2010 WL 2912538 (arguing among other things that the 10<sup>th</sup> Amendment prevents Congress from legislating in traditional state area).

<sup>98</sup> 85A O.S. §301 et seq.

<sup>99</sup> 85A O.S. § 1 et seq.

<sup>100</sup> 85A O.S. § 201, et seq.

<sup>101</sup> 85A O.S. § 301 et seq.

<sup>102</sup> *See* *Coates v. Fallin*, 316 P.3d 924 (Ok. 2013)

<sup>103</sup> 85A O.S. §211(B) (1-4). At least one justice of the Oklahoma Supreme Court would find this provision unconstitutional on its face. *Coates v. Fallin*, *supra.*, 316 P.3d at 929 (Reif., J, dissenting)

<sup>104</sup> 85A O.S. §211(B)(5). "1132(e)(1)" is an ERISA enforcement provision specifying, among other things, that actions may be brought in state courts of "competent jurisdiction." As Justice Combs noted in *Coates v. Fallin*, *supra.* at 928:

Taken together, these provisions indicate that the only opportunity a Claimant has to develop a factual record under the minimum requirements of 211 is before the committee chosen by his or her employer. The Workers' Compensation Commission is limited to the record developed in the internal appeals process, and this Court in turn is limited to the record considered by the Commission.

plan not covered by the workers' compensation statute—that is, an alternative benefit plan— is covered by ERISA, but that is an open question.<sup>105</sup> The Injury Benefit Act also requires that the Commission “shall rely on the record established by the internal appeal process and use an objective standard of review that is not arbitrary or capricious.”<sup>106</sup> The ability of an employer to opt out is liberally authorized. The employer is required only to provide notice to state officials and employees,<sup>107</sup> develop a written benefit plan,<sup>108</sup> post a bond of \$1500,<sup>109</sup> and provide additional assurances to insurance officials that it has sufficient assets “in an amount determined by the Commissioner which shall be at least an average of the yearly claims for the last three years.”<sup>110</sup> In short, it is meant to be and is very easy for an employer to opt-out from workers' compensation in Oklahoma.<sup>111</sup>

Procedural innovations such as those discussed in the previous paragraph do not, of course, immediately implicate the *quid pro quo*, which is usually regarded as a question of the adequacy of the substantive exchange of rights and remedies.<sup>112</sup> The procedural due process implications in the design of employer-dominated “committees,”<sup>113</sup> coupled with limited judicial review are plain

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<sup>105</sup> Under ERISA 29 U.S.C. §1002 (1): “The terms “employee welfare benefit plan” and “welfare plan” mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise,

(A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . .”

29 U.S.C. §1003(b)(3) in relevant part exempts from ERISA any employee benefit plan “maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation laws or disability insurance laws.”

Section of 1144(a) of ERISA states that “[e]xcept as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. .

However, 29 U.S.C. §1003(b)(3) in relevant part exempts from ERISA any employee benefit plan “maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation laws or disability insurance laws.” The underlying logical assumption is that creation of an alternative benefit plan is precisely for the purpose of *not* complying with a “workmen’s compensation law.” Yet opt-out plans are only permissible if compliance with the Injury Benefit Act is achieved, and it is arguable whether that statute is a “workmen’s compensation law.”

<sup>106</sup> 85A O.S. §211(B) (6). Notably, this standard of review affords courts less discretion in reviewing plan decisions than they would have in reviewing an agency decision under the Oklahoma Administrative Workers' Compensation Act which provides traditional APA review. *See* 85A O.S. §78

<sup>107</sup> 85A O.S. § 202(B) & (I). The employer’s notice to employees, which must be provided to employees at time of hire, must state that “it does not carry workers' compensation insurance coverage and that such coverage has terminated or been cancelled.”

<sup>108</sup> 85A O.S. §202 (A)(2)

<sup>109</sup> 85A O.S. §202 (B)

<sup>110</sup> 85A O.S. §204(B)(2)

<sup>111</sup> However, as has been mentioned it is even easier for an employer to opt-out of the system in Texas. As of this writing

<sup>112</sup> *But see e.g.* *Kuney v. PMA Ins. Co.*, 578 A.2d 1285, 424 (Pa. 1990) (“where statutory remedies are provided, the procedure prescribed by the statute must be strictly pursued, to the exclusion of other methods of redress.”) (Internal citations omitted).

<sup>113</sup> Both Oklahoma and federal courts have insisted that a fundamental element of due process is a fair and impartial trial. *Clark v. Board of Education of Ind. Sch. Dist. No. 89*, 32 P.3d 851, 854 (OK 2001). This includes a

enough but beyond the scope of this discussion.<sup>114</sup> One is inclined in passing to agree with Oklahoma Supreme Court Justice Combs in *Coates v. Fallin*,<sup>115</sup> the first state Supreme Court case challenging the constitutionality of the Oklahoma Act. A number of “disparate treatment” issues under this unilateral employer system will emerge but must await future judicial analysis.<sup>116</sup> Nevertheless, facial *quid pro quo* challenges alleging both inadequate procedure and substance appear unavoidable, and have already begun.<sup>117</sup> Furthermore, as elsewhere in the law, what might initially seem procedural can have a profoundly substantive impact on a case. As Thomas Main recently wrote, procedure is a tool of power and can negate substantive rights.<sup>118</sup>

Nevertheless, turning to substance, the alternative benefit plan an employer is permitted to provide, even as it maintains the exclusive remedy rule,<sup>119</sup> is as follows:

The benefit plan shall provide for payment of the same forms of benefits included in the Administrative Workers’ Compensation Act for temporary total disability, temporary partial disability, permanent partial disability, vocational rehabilitation, permanent total disability, disfigurement, amputation or permanent total loss of use of a scheduled member, death and medical benefits as a result of an occupational injury, on a no-fault basis, with the same statute of limitations, and with dollar, percentage, and duration limits that are at least equal to or greater than the dollar, percentage, and duration limits contained in Sections 45, 46 and 47 of this act. For

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neutral and detached decision maker. *Id.* See also *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (“Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’”).(Internal citation omitted).

<sup>114</sup> A due process challenge was rejected by the Oklahoma Supreme Court on original jurisdiction grounds. *Pilkington v. State of Oklahoma, ex rel. Doak*, File No. PR-113662 (Apr. 27, 2015). Several additional challenges are pending as of this writing. The *Pilkington* papers provide adequate flavor:

There is no due process protection in allowing an Oklahoma employer to OPT OUT of the statutory workers’ compensation system, set up its own benefit plan, make all the decisions regarding benefits, determine who and how a plan can be reviewed, and have total control of the development of the record for appeal. Nowhere along the way is there an agency or court or unbiased tribunal to look at the merits of an injured worker’s case. OPT OUT employers are allowed to replace a judge with a committee chosen by the employer. That flies in the face of the federal and state constitutions.

*Pilkington v. Doak, supra.*, Combined Application to Assume Original Jurisdiction, Petition for Writ of Prohibition, Petition For Declaratory Relief, And Brief In Support Thereof, *available at* <http://compblog.com/wp-content/uploads/2015/02/Okla-Option-challenge.pdf>

<sup>115</sup> 316 P.3rd 924

<sup>116</sup> *Id.* at 926 (Combs, J., concurring) (“As the law has not yet taken effect, it is unclear exactly how these issues will manifest themselves in future cases or controversies, but it is necessary to acknowledge the constitutional problems these Acts will produce when claimants begin to receive disparate treatment in their recourse to the law based upon decisions made by their employers.”)

<sup>117</sup> A leading Oklahoma practitioner informs the author that multiple cases in Oklahoma are pending which charge legislative violation of the “grand bargain”/*quid pro quo*. See e.g. *Duck v. Morgan Tire*, Supreme Court No. 113,601, *Torres v. Seaboard Foods*, Supreme Court No. 113,649, *Deason v. Integris Baptist Medical Center*, Supreme Court No. 113,648, *Mullendore v. Mercy Hospital Ardmore*, Supreme Court No. 113,560, *Robinson v. Fairview Fellowship Home*, Supreme Court No. 113,735, *Brown v. Claims Management Resources*, Supreme Court No. 113,609, *Nowlin v. Medicalodges, Inc.*, Supreme Court No. 113,607

<sup>118</sup> Thomas Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV., 801, 818 (2010)

<sup>119</sup> See *supra.* n.23 and accompanying text.

this purpose, the standards for determination of average weekly wage, death beneficiaries, and disability under the Administrative Workers' Compensation Act shall apply under the Oklahoma Employee Injury Benefit Act; but no other provision of the Administrative Workers' Compensation Act defining covered injuries, medical management, dispute resolution or other process, funding, notices or penalties shall apply or otherwise be controlling under the Oklahoma Employee Injury Benefit Act, unless expressly incorporated.<sup>120</sup>

Glossing this language it might initially appear that the substantive core of the Act has been preserved.<sup>121</sup> However, this preliminary conclusion will not withstand scrutiny and ignores the depth, range, and subtlety of substantive disputes that arise in workers' compensation cases. For example, the provision provides for the same "forms" of benefits for various categories of disability. Perhaps that means only that both medical and indemnity benefits are available under the Act. Perhaps it means something more. In any event, the language does not specify amounts of damages for degrees of incapacity, as would be the case in a workers' compensation statute. In a similar vein, there may be no question that, if an employee is totally incapacitated for work, he or she would be entitled to a benefit amount based on the average weekly wage at the time of injury, as traditionally calculated, and for the duration of an incapacity.<sup>122</sup> Yet the pivotal issue in workers' compensation claims is often causation.<sup>123</sup> Causation lurks behind seemingly banal phrases like "covered injuries," "medical management," and "dispute resolution," all of which are explicitly unmoored from the traditional Act.<sup>124</sup> Thus, a causation dispute will often involve sharply contested medical evidence<sup>125</sup> that will now be weighed, credited, or rejected by employer-designated fact finders subject to ultra-deferential judicial review.<sup>126</sup>

In addition, the alternative plans are not required to adhere to the traditional Act's provisions on "medical management."<sup>127</sup> This exemption apparently refers to the traditional Act's requirement that an injured worker be afforded a right to choose his or her own doctor. As observers of injury law are aware, in many contested cases parties provide to fact finders medical opinions that are diametrically opposed on, for example, the cause and duration of a claimant's disability.<sup>128</sup> Presumably under an alternative benefit plan, an employer would have discretion as to whether to pay for the services of or to accept into evidence the medical opinion of a claimant's treating doctor. Thus, an employer is in a position to send an injured worker to its preferred physician and the issue of dueling doctors or independent medical examiners is extinguished.<sup>129</sup>

Another paragraph of the Injury Benefit Act states:

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<sup>120</sup> 85A O.S. §203(B)

<sup>121</sup> 85A O.S. §45, for example, appears to incorporate most of the disability benefit structure of the Act. That is, the provision seems to require alternative benefits to pay permanent and temporary benefits that are both total and partial.

<sup>122</sup> 85A O.S. §45.

<sup>123</sup> 82 Am. Jur. 2d Workers' Compensation §194 (2015)

<sup>124</sup> See *supra*. n.120 and accompanying text.

<sup>125</sup> 82 Am. Jur. 2d Workers' Compensation § 543 (2015)

<sup>126</sup> Coates v. Fallin, *supra.*, 316 P.3d at 926-28 (Combs, J., dissenting)

<sup>127</sup> See *supra*. n.120 and accompanying text.

<sup>128</sup> See DUFF, WORKERS' COMPENSATION LAW at 255-256

<sup>129</sup> 85A O.S. § 203(B); see generally Burton & Spieler, *Lack of Correspondence*, *supra*. n.53, at 501-502.

The benefit plan may provide for lump-sum payouts that are, as reasonably determined by the administrator of such plan appointed by the qualified employer, actuarially equivalent to expected future payments. The benefit plan may also provide for settlement agreements; provided, however, any settlement agreement by a covered employee shall be voluntary, entered into not earlier than the tenth business day after the date of the initial report of injury, and signed after the covered employee has received a medical evaluation from a nonemergency care doctor, with any waiver of rights being conspicuous and on the face of the agreement. The benefit plan shall pay benefits without regard to whether the covered employee, the qualified employer, or a third party caused the occupational injury; and provided further, that the benefit plan shall provide eligibility to participate in and provide the same forms and levels of benefits to all Oklahoma employees of the qualified employer. The Administrative Workers' Compensation Act shall not define, restrict, expand or otherwise apply to a benefit plan.<sup>130</sup>

In other words, an administrator appointed solely by the employer determines whether the employee's lump sum payments are "actuarially equivalent" to future benefits. The provision affords no limitations on the selection or qualifications of the administrator. Normally such a determination would involve cautious exercise of judgment in making accurate assessments of the expected lifetime value of a claim and then in calculating the present value of the claim. Such determinations can be complex and subject to dispute.<sup>131</sup> The text of the provision additionally gives no indication that, subsequent to execution of the agreement, the settlement must be approved by a public official, or that an aggrieved injured worker could obtain judicial review of the agreement. Furthermore, a plan may authorize settlement agreements and waivers as early as ten business days after an injury, when the magnitude of an injury may still not be fully known. This presents problems that are similar to pre-injury waivers of injury. While waivers must be conspicuous, nothing in the provision requires that waivers be knowing or intelligent.<sup>132</sup> An employee might easily sign away all rights before becoming aware of the magnitude of an injury and have limited access to judicial review thereafter.<sup>133</sup>

To say that a system like Oklahoma's might provoke legal challenge is an understatement. To say that the Oklahoma system might get "bad press" is obvious. However, at the end of the day it remains true that the Oklahoma legislature enacted the system, and courts do not lightly set aside the acts of legislatures.<sup>134</sup> Furthermore, the system is not irrational if the measure of rationality is saving businesses money. However, if the rights being displaced by the Injury Benefit Act are fundamental, or even "very important," such that the level of scrutiny applied by courts is higher than that applied when reviewing merely economic regulation, the Oklahoma system may be quite vulnerable to legal attack because of the high risk that through its operation injured workers will be deprived of reasonable remedies.

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<sup>130</sup> 85A O.S. § 203(C)

<sup>131</sup> DUFF, WORKERS' COMPENSATION LAW at 190-191

<sup>132</sup> See generally Valles v. Daniel Construction Co., 581 S.W.2d 911 (Ten. 1979)

<sup>133</sup> Of course, it is somewhat unclear what rights could be waived since so much of the traditional Act may be excluded from an injury benefit plan.

<sup>134</sup> Gulf, Colorado & Santa Fe Railway Co. v. Ellis, 165 U.S. 150 (1897)

### C. Florida

In some states critics have alleged that the incremental erosion of workers' compensation benefits has resulted in abandonment of the workers' compensation *quid pro quo* or Grand Bargain.<sup>135</sup> In those states legislatures have significantly scaled back the amount or duration of indemnity benefits and limited medical treatment of work related injuries.<sup>136</sup> In these erosional contexts it has been argued that the societal deal originally struck in the *quid pro quo* of workers' compensation has been breached.<sup>137</sup> Conceptually, the theory is challenged by attempting to establish the point at which reductions in benefits have effectively eliminated the workers' compensation bargain. Unlike opt-out, systems that are gradually reducing benefits do not face the critique that they have suddenly eliminated workers' compensation rights without any legal guarantee of a "reasonably just substitute."<sup>138</sup> Of course, those complaining of incremental erosion may suspect legislative motives of eventual elimination of all remedies, but it is usually a conceptual leap to get appellate courts to expand challenges to that extent. One significant historical complication is that very early versions of workers' compensation statutes provided

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<sup>135</sup> See Grabell & Berkes, *Demolition, supra.*, n.56 and accompanying text

<sup>136</sup> As a bill introduced in the House of Representatives in 2009, but not passed, recited:

Since [1972], changes in reductions in State workers' compensation laws have increased the inadequacy and inequitable levels of workers' compensation benefits. Serious questions exist concerning the fairness and adequacy of present workers' compensation laws in light of the growth of the economy, changing nature of the labor force, misclassification of workers as independent contractors, and as leased employees, as well as erosion of remedies for the bad faith handling and delay in payment of benefits and medical care to workers and their families, increases in medical knowledge, changes in the hazards associated with various employment, new risks to health and safety created by new technology, and increases in the general level of wages and in the cost of living.

Sec. 2(3), H.R.635.IH , 111th Congress (2009-2010)

Recently stories in the popular press have been arguing the same point. Howard Berkes, *Injured Workers Suffer As 'Reforms' Limit Workers' Compensation Benefits*, NPR, March 4, 2015, available at <http://www.npr.org/2015/03/04/390441655/injured-workers-suffer-as-reforms-limit-workers-compensation-benefits> (last visited Jan. 6, 2016):

Since 2003, legislators in 33 states have passed workers' comp laws that reduce benefits or make it more difficult for those with certain injuries and diseases to qualify for them. Florida has cut benefits to its most severely disabled workers by 65 percent since 1994 . . . Many states have not only shrunk the payments to injured workers; they've also cut them off after an arbitrary time limit — even if workers haven't recovered.

<sup>137</sup> See Amanda Yoder, *Resurrection of a Dead Remedy: Bringing Common Law Negligence Back into Employment Law*, 75 MISSOURI L. REV. 1093, 1094 (2010) ("The original bargain struck between employer and employee that formed the basis of worker compensation statutes [in Missouri] is no longer the same balanced exchange.")

<sup>138</sup> Especially with respect to an opt-out structure that both retains the exclusive remedy rule and eliminates employees' rights to a statutory workers' compensation benefit. See generally *Smother v. Gresham Transfer, Inc.*, *supra.*, n.50 (finding that remedy clause in state constitution mandated that a remedy be available to all persons for injuries to "absolute" common-law rights for which a cause of action existed when the drafters wrote the constitution and concluding that, having demonstrated that there was no remedial process available under present workers' compensation laws, plaintiff should have been allowed to proceed with negligence action).

benefits that were at times substantially less generous than those contained in modern workers' compensation statutes. As a practical matter, from the very beginning of workers' compensation, benefits varied widely by state and according to historical economic circumstances.<sup>139</sup> This is conceptually problematic for challengers because it makes it difficult to establish a uniform baseline against which to measure "the Grand Bargain."

A case recently litigated in Florida provides an excellent example of an incremental reductionist claim. In *Padgett v. State of Florida*<sup>140</sup> a plaintiff challenged the unfolding of the 2003 revisions to Florida's workers' compensation statute. Challenges raised in the case included one to the requirement that injured workers in some instances be responsible for payment of medical treatment necessitated by their work-related injuries, an obligation that is at odds with core understandings of the nature of workers' compensation.<sup>141</sup> Another major challenge raised in *Padgett* was to the 2003 elimination of wage loss benefits for partial incapacity.<sup>142</sup> The case commenced when an injured worker sued his employer in negligence.<sup>143</sup> The employer defended by raising the exclusive remedy immunity of the Florida Workers' Compensation Act.<sup>144</sup> In response, the plaintiff amended his complaint, seeking a declaration that the exclusive remedy immunity was invalid and violated due process under the Fourteenth amendment of the U.S. Constitution, and the open courts and other provisions of the Florida constitution.<sup>145</sup> The employer then withdrew its exclusive remedy defense, and the court severed it as a party from the declaratory relief portion of the complaint.<sup>146</sup> The employer's exit from the case called into question the existence of a reviewable controversy, an issue that would essentially result in the case's

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<sup>139</sup> FISHBACK AND KANTOR, PRELUDE TO THE WELFARE STATE 174-177 (providing statistical information showing the wide variation in workers' compensation benefit levels from 1911-1930)

<sup>140</sup> 11-13661 CA25 (2014). The case was dismissed on mootness and standing grounds, so the merits were not ultimately reached by the Florida appellate courts. *State of Florida v. Florida Workers' Advocates*, No. 3D14-2062 (3<sup>rd</sup> Dist. 2015). The discussion nevertheless focuses on *Padgett* because it raised the essential incremental-erosional challenge. Other similar cases are in the pipeline as of this writing including *Castellanos v. Next Door Co.* and *Westphal v. City of St. Petersburg*, 122 So.3d 440.

<sup>141</sup> *Id.* slip op. at 3

<sup>142</sup> *Id.* The statute provides a one-time payment for a "scheduled" partial benefit depending on the portion of the body affected by a work-related injury. For an excellent discussion of the varieties of partial incapacity benefits see Peter S. Barth, COMPENSATING WORKERS FOR PERMANENT PARTIAL DISABILITIES, U.S. SOCIAL SECURITY ADMINISTRATION, OFFICE OF POLICY *available at* <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p16.html> (last accessed December 15, 2015) (last visited Jan. 6, 2016):

In most states, the most expensive category of cases are for permanent partial disability. A nine-state study that examined the costs of cases as of March 2002 for injuries that occurred in 1998–1999 found that over one-half of cases in which temporary disability lasted more than 7 days resulted in permanent partial disability in six of the nine states (Telles, Wang, and Tanabe 2004). The median cost of such cases in the nine states exceeded \$32,000. Blum and Burton (2003, Table 7A) have reported that the average amount of cash benefits paid per permanent partial disability case nationally for accident (injury) year 1999 was over \$35,000. Many permanent partial disability cases take years to resolve; in some states, a significant fraction were not closed more than 3 years after the injury date.

*Id.*

<sup>143</sup> *Padgett, supra.*, n.140 at 1

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 2

<sup>146</sup> *Id.*

dismissal.<sup>147</sup> Reviewability appeared preliminarily to be restored when Padgett, a “concrete” workers’ compensation beneficiary allegedly harmed by the statute, was allowed to intervene.<sup>148</sup>

Understanding the *Padgett* context requires some work. In 1968 Florida revised its Constitution and Declaration of Rights.<sup>149</sup> At the time of the revision, the Florida Workers’ Compensation Act provided full payment for medical treatment and weekly indemnity benefits for partially disabled workers.<sup>150</sup> In 1970, the legislature amended the Act to, among other things, prevent *injured workers* from opting out of workers’ compensation and suing in tort, which up to that time had been authorized.<sup>151</sup> No increased benefits were afforded workers in exchange for giving up their right to sue.<sup>152</sup> In 1973, Florida became a comparative as opposed to a contributory negligence state.<sup>153</sup> As a result of this change, plaintiffs could *not* be absolutely barred from receiving a tort remedy if they “in any appreciable way contributed to the proximate cause of the injury.”<sup>154</sup> Accordingly, stripping workers of the right to sue in tort became a different proposition because tort plaintiffs had become able to recover damages on a comparative negligence theory, making recovery more likely than it had been in 1970.<sup>155</sup> In 2003, the Florida legislature suspended injured workers’ entitlement to partial incapacity indemnity benefits.<sup>156</sup> The Act, as amended in 1994, required for the first time that injured workers pay for a portion of medical treatment related to their work-related injuries after the workers reached “maximum medical improvement.”<sup>157</sup>

Given these developments the trial court in *Padgett* concluded that the *quid pro quo* of tort for workers’ compensation was no longer adequate.<sup>158</sup> Partial incapacity attributable to an employer’s negligence in causing a work-related injury would have been fully compensable in negligence

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See the website of the Florida Senate available at <http://www.flsenate.gov/Laws/Constitution> (last accessed April 26, 2015)

<sup>150</sup> *Id.*

<sup>151</sup> The employee opt-out right was apparently originally conferred to mirror the employer’s corresponding right to opt out of the system, a right that was also extinguished as part of the 1970 amendments. See *Padgett* at 7, 8. One may recall that Texas affords both employers and employees the right to opt out of its Act. So in an interesting twist Florida’s alleged abrogation of the exclusive remedy rule began with *cessation* of opt-out.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 7

<sup>154</sup> *German-American Lumber Co. v. Hannah*, 53 So. 516, 517 (Fla. 1910)

<sup>155</sup> Contributory negligence automatically shuts off the plaintiff who is also negligent in connection with a harm while comparative negligence allows for the possibility of tort recovery even where the plaintiff is also negligent. See e.g. *Bradley v. Appalachian Power Co.*, 256 S.E. 2d 879 (W.Va. 1979)

<sup>156</sup> *Padgett* at 8. Under many workers’ compensation statutes an injured worker would be entitled to both a scheduled benefit as a statutory remuneration for the injury to a listed body part or member and a partial benefit based in some manner on a loss of earning capacity as reflected by the difference between the worker’s pre-injury wage and post-injury earning capacity. See n.124, *supra.*, for discussion of partial benefit designs. Professor John Burton, the leading American academic commentator on workers’ compensation law, testified by deposition in *Padgett*. According to Professor Burton as of the date of his testimony there was no other state in the country that had *completely* eliminated workers’ compensation wage loss benefits for employees who had suffered a partial (as opposed to a total) loss of work-related earning capacity. *Padgett* at 4.

<sup>157</sup> FL. ST. 440.13(13)(c): “Notwithstanding any other provision of this chapter, following overall maximum medical improvement from an injury compensable under this chapter, the employee is obligated to pay a copayment of \$10 per visit for medical services. The copayment shall not apply to emergency care provided to the employee.” For a definition of “Maximum Medical Improvement” see *infra*. n.169. In addition apportionment of some medical costs began pursuant to the 2003 amendments.

<sup>158</sup> *Padgett* at 19-20

prior to the creation of the workers' compensation remedy, the court opined, as would medical treatment made necessary by such tortious conduct.<sup>159</sup> The exclusive remedy rule reduced aggregate liability for employers, continued the court, but because of the reduction in workers' compensation benefits there was no longer a truly correlative benefit for workers. Thus, the nature of the *quid pro quo* changed.<sup>160</sup> The court appeared to have accepted the argument that workers were forced to give up more to participate in the workers' compensation system than had been the case prior to 1970 as a result of losing the right to sue.<sup>161</sup>

The unified narrative from *Padgett* may perhaps be summarized as follows. At the time of the creation of the Florida exclusive remedy rule in 1935,<sup>162</sup> workers were arguably satisfied with the *quid pro quo* because of the toll that the affirmative defense of contributory negligence took on common law negligence suits. However, the replacement in Florida of contributory negligence by comparative negligence<sup>163</sup> meant that, if negligence could be established, workers were much more likely to enjoy some recovery in tort. To the extent the recovery would exceed the typical workers' compensation remedy of two-thirds of the average weekly wage at the time of the injury, workers would prefer the negligence recovery. Furthermore, a worker partially incapacitated or disabled and suffering only a partial wage loss as a result of her employer's negligence might be entitled to complete recovery of that wage loss in tort, but not in workers' compensation. Similarly, an injured worker might be able to achieve in tort complete recovery for medical expenses related to a work injury, while under the present workers' compensation system in Florida there is a chance of less than full recovery for medical treatment required by a work-related injury. The legal baseline inherent in the *quid pro quo* has changed. The rhetorical question posed is whether a hypothetical worker in the "original position" during the inception of workers' compensation would agree to this version of the grand bargain.<sup>164</sup> Furthermore, the argument might continue, the absence of worker premiums for changes in tort law amounted to a windfall for employers.<sup>165</sup> In these circumstances, maintaining the exclusive remedy rule is no longer supportable.<sup>166</sup>

Florida courts had already faced similar arguments in recent years in slightly different contexts. In *Westphal v. City of St. Petersburg*,<sup>167</sup> for example, a Florida appellate court was faced with an interpretation of the Florida Workers' Compensation Act that effectively left certain classifications of totally incapacitated workers without any remedy for workplace injury.<sup>168</sup> In *Westphal*, certain workers, who had been temporarily totally disabled for the maximum statutory period for entitlement to those benefits, had not yet been found to have reached maximum medical improvement,<sup>169</sup> a condition precedent for transitioning from temporary to *permanent* benefits.<sup>170</sup>

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<sup>159</sup> *Padgett* at 16. Of course, this assumes that the work-related injury was not an accident. What workers' undeniably get from workers' compensation is compensation for accidents, a remedy that would not be available in a fault based regime like negligence.

<sup>160</sup> *Padgett* at 16-18.

<sup>161</sup> *Padgett* at 16.

<sup>162</sup> *Padgett* at 6.

<sup>163</sup> See generally *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973)

<sup>164</sup> *Padgett* at 7.

<sup>165</sup> *Padgett* at 3-4

<sup>166</sup> *Padgett* at 19-20.

<sup>167</sup> 122 So.3d 440 (Fla.App.1 Dist. 2013)

<sup>168</sup> *Id.* at 444

<sup>169</sup> Maximum medical improvement is the point at which the employee's injury will not materially improve with additional rest or treatment. 100 C.J.S. Workers' Compensation § 650 (2015)

<sup>170</sup> *Id.*

Thus, their entitlement to workers' compensation benefits simply expired, even though they continued to be totally disabled as a factual matter.<sup>171</sup> Thus, an uncompensated "gap" was created between the time of the temporary total disability expiration and the point at which they were eventually able to reestablish entitlement to total permanent benefits.<sup>172</sup> While the court did not explicitly discuss *quid pro quo*, it did observe that:

. . . . [A]n interpretation that would create a potential gap in disability benefits could result in an uncorrectable error. If the claim is denied because the disabled worker may still improve and it turns out later that he or she does not improve, the logical inference would be that the worker had, in fact, reached maximum medical improvement earlier. Yet there is nothing in the law that would enable the worker to recover the disability benefits he or she should have been receiving in the meantime. It is reasonable to conclude that, if the Legislature had intended to create a gap in the payment of disability benefits, it would have at least provided a remedy for the recovery of lost benefits if it could be shown later that the claimant was actually at maximum medical improvement all along and should have been receiving those benefits . . . we have never before been confronted with a constitutional challenge to the statutes in question. Such a question was not presented . . . in any other previous case presented to the court. It is safe to say that the prospect of declaring the statute unconstitutional put the issue in an entirely new light.<sup>173</sup>

The strong implication was that workers left with no recovery might have a basis for constitutional challenge premised on the lack of any remedy for injury.<sup>174</sup> In *Padgett* the trial court relied heavily on the Florida Supreme Court's opinion in *Martinez v. Scanlan*.<sup>175</sup> There, the Court rejected a *quid pro quo* argument raised by Scanlan, who had challenged the 1990 workers' compensation statutory amendments on a variety of theories. With respect to a challenge premised on breach of *quid pro quo*, the court said:

Although chapter 90–201 undoubtedly reduces benefits to eligible workers, the workers' compensation law remains a reasonable alternative to tort litigation. It continues to provide injured workers with full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation. Furthermore, while there are situations where an employee would be eligible for benefits under the pre–1990 workers' compensation law and now, as a result of chapter 90–201, is no longer eligible, that employee is not without a remedy. There still may remain the viable alternative of tort litigation in these instances. As to this attack, the statute passes constitutional muster.<sup>176</sup>

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<sup>171</sup> *Id.* at 446

<sup>172</sup> *Id.* at 447

<sup>173</sup> *Id.* 447-448

<sup>174</sup> The case has been appealed to the Florida Supreme Court and is awaiting decision as of this writing.

<sup>175</sup> 582 So.2d 1167 (Fla. 1991)

<sup>176</sup> *Id.* 1171-1172

The plaintiff's arguments in *Padgett* regarding this language, contentions the trial judge accepted, were first that recent developments had undercut *Martinez's* rationale as to why workers' compensation continued to be a reasonable alternative to tort litigation.<sup>177</sup> After 2003, workers' compensation in Florida no longer provided injured workers with full medical care in some cases, or with any wage loss compensation for partial disability.<sup>178</sup> Second, in light of the benefit reductions, injured workers are now authorized to proceed in tort. The important conceptual point in *Padgett*, a point that was established implicitly by *Martinez*, is that the level and duration of benefits could be subject to scrutiny for adequacy to ensure the statute continued to pass constitutional muster under the Florida Constitution.<sup>179</sup> *Martinez* essentially opened the door for *Padgett* and future cases premised on continued benefit adequacy.

The Florida incremental erosion cases are driven by the unique history and structure of the Florida constitution. A number of states possess constitutions containing language requiring "open courts,"<sup>180</sup> and Florida is no exception. Article I, Sec. 21 of the Florida Constitution states, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."<sup>181</sup> The language has suggested to some that there must be at least some substantive remedy for injury, and cases like *Westphal*,<sup>182</sup> raising scenarios in which workers might be left with no remedy, become problematic under such an interpretation. However, not every state with an open courts provision has read a substantive right to a remedy into the provision.<sup>183</sup>

A second, potent anti-erosional feature of Florida law was showcased in *Kluger v. White*.<sup>184</sup> There, the Florida Supreme Court considered a law providing that tort actions in connection with automobile accidents were completely abolished when a putative plaintiff carried automobile insurance or when a plaintiff not carrying insurance suffered damages of less than \$550.<sup>185</sup> Because in *Kluger* the fair market value of the plaintiff's damaged automobile was \$250, she could receive no more than that sum under Florida law.<sup>186</sup> Because she also carried no insurance, she was effectively without a remedy for her damages.<sup>187</sup> The court found that the abolishment of the remedy violated the Florida open courts provision.<sup>188</sup> In support of its conclusion, the court first noted that it "ha[d] never before specifically spoken to the issue of whether or not the constitutional guarantee of a 'redress of any injury' . . . bars the statutory abolition of an existing remedy without providing an alternative protection to the injured party."<sup>189</sup> Noting that Florida's Declaration of Human Rights had previously been found binding on the legislature, the court recited the following language from the *Corpus Juris Secundum*:

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<sup>177</sup> *Padgett* at 16.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See infra*. Section IV.

<sup>181</sup> Art. 1, Sec. 21

<sup>182</sup> *See supra*. at 133, and accompanying text

<sup>183</sup> *See infra*. Section IV.

<sup>184</sup> 281 So.2d 1 (Fla. 1973)

<sup>185</sup> *Id.* at 2.

<sup>186</sup> *Id.* at 3.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* For text of the provision *see supra*. n.181 and accompanying text.

<sup>189</sup> *Id.*

A constitutional provision insuring a certain remedy for all injuries or wrongs does not command continuation of a specific statutory remedy. However, in a jurisdiction wherein the constitutional guaranty applies to the legislature as well as to the judiciary . . . it has been held that the guaranty precludes the repeal of a statute allowing a remedy where the statute was in force at the time of the adoption of the Constitution. Furthermore . . . the guaranty also prevents, in some jurisdictions, the total abolition of a common-law remedy.<sup>190</sup>

Because the right to a tort recovery for the type of automobile accident suffered by the plaintiff existed prior to the adoption of the 1968 iteration of the Florida Constitution, the court deemed it “essential . . . that this Court consider whether or not the Legislature is, in fact, empowered to abolish a common law and statutory right of action without providing an adequate alternative.”<sup>191</sup> The court then went on to announce principles that are germane to the workers’ compensation discussion. The court said,

Upon careful consideration of the requirements of society, and the ever-evolving character of the law, we cannot adopt a complete prohibition against such legislative change. Nor can we adopt a view which would allow the Legislature to destroy a traditional and long-standing cause of action upon mere legislative whim, or when an alternative approach is available. . . We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . ., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.<sup>192</sup>

Thus, the argument goes in *Padgett*, because the workers’ compensation *quid pro quo* predated the 1968 constitution, the court must “not allow the Legislature to destroy a traditional and long-standing cause of action upon mere legislative whim, or when an alternative approach is available.”<sup>193</sup> Further, workers’ compensation may not be abolished “unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.”<sup>194</sup> The rejoinder to the argument is that an amendment to the workers’ compensation statute is not an abolishment. However, this begs the question of how far a statute can be amended before it ceases to retain its essential character.

The peculiar character of Florida’s constitution therefore makes it uniquely possible to argue that workers’ compensation benefits as a substitute for a longstanding tort remedy may not be abolished without providing a reasonable alternative absent an “overpowering public necessity.”

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<sup>190</sup> *Id.* at 3-4, citing 16A C.J.S. Constitutional Law s 710, pp. 1218-1219.

<sup>191</sup> *Kluger, supra.*, 281 So.2d at 4.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *See supra.* n.192 and accompanying text

Other state courts may of course be less inclined to place their thumbs on the scale of “reasonable” alternatives when interpreting legislative modifications of workers’ compensation statutes.<sup>195</sup>

#### D. Section Conclusion

Whether authorizing opt-out, as in Texas and Oklahoma, or enacting incremental-erosional changes in medical and permanent partial incapacity benefits, as in Florida, states can anticipate pushback by plaintiffs to workers’ compensation benefit reductions. Because of the multijurisdictional character of workers’ compensation law both statutory modification and opposition to change can take on a peculiarly local character, as they have in the three states discussed in this section. Nevertheless, workers’ compensation law, despite being formally multi-state in character, was originally instituted as a sweeping national phenomenon. Between 1910 and 1920, forty-three states enacted workers’ compensation statutes, a rate of implementation that would be the envy of many *federal* statutes.<sup>196</sup> With current total national workers’ compensation expenditures of just under \$60 billion dollars per year,<sup>197</sup> plaintiffs and defendants in various states possess large incentives both to oppose and to support modifications to workers’ compensation law, and, in accordance with history, to move quickly. The remainder of this article sketches the probable contours of legal argument surrounding proposed changes to traditional workers’ compensation statutes, premised on both state and federal constitutional law. These arguments—which apply equally in other tort reform contexts—will likely test the limits of legislative hegemony in the realm of personal injury rights and remedies, and plaintiffs will seek to develop a framework of “rights” which may not be dispossessed lightly.<sup>198</sup> The next section discusses state constitutional theories germane to the restraint of state legislatures seeking to reform personal injury law.

#### IV. STATE RESTRAINT – OPEN COURTS, RIGHT TO A REMEDY, QUID PRO QUO

Challenges to significant changes in workers’ compensation law sound like challenges to tort reform seeking to reduce plaintiff remedies. Because workers’ compensation was the personal injury substitute for tort, significant incursions on workers’ compensation should be seen in the same way as interference with tort. Assuming a court were to accept this premise, the next question centers on the importance of the tort right or of a right to remedy for personal injury generally. The underlying question is whether a right to a remedy for personal injury—whether in tort or workers’ compensation—is of more than ordinary importance and whether the right’s diminution by a legislature is sufficient to generate heightened judicial scrutiny. Arguments that a right to a remedy for personal injury should be treated as possessing such importance has received vague support at the federal level.<sup>199</sup> At the state level, however, plaintiffs have occasionally made

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<sup>195</sup> See generally *infra*. Part IV.

<sup>196</sup> FISHBACK AND KANTOR, *PRELUDE TO THE WELFARE STATE* at 103-104.

<sup>197</sup> See LIBERTY MUTUAL RESEARCH INSTITUTE, *WORKPLACE SAFETY INDEX available at* <http://www.libertymutualgroup.com/omapps/ContentServer?pagename=LMDGroup/Views/LMG&ft=4&fid=1240029010623&ln=en>

<sup>198</sup> Goldberg, *The Constitutional Status of Tort Law, supra*. n.32 at 626: “The law of redress is basic to our conception of liberal-constitutional government, and was built into the fabric of our legal system.”

<sup>199</sup> Compare White, *supra*. n.28 and accompanying text with *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (rejecting tort-based challenge to preemption under the Price Anderson Act repeating

headway arguing that significant reduction or elimination of injury damages should be evaluated by the judiciary with heightened scrutiny because the rights in question are at least important under a state's constitution.<sup>200</sup> One variation of the argument is that benefit reductions result in inadequate or unreasonably low compensation, effecting a breach in the original "Grand Bargain" or *quid pro quo* in which workers surrendered their tort rights for reasonable alternative compensation.<sup>201</sup> Another variation of state constitutional argument centers on "right to a remedy" provisions.<sup>202</sup> As will be discussed in more detail below,<sup>203</sup> *quid pro quo* and "right to a remedy" theories are closely related. Implicit in the concept of *quid pro quo* is the idea that it would be impermissible to extinguish one right of the involved kind without replacing it with another similar right because the original right was important.<sup>204</sup>

Of course, plaintiffs have challenged limitations on tort remedies on several other state constitutional theories including the denial of the right to a jury trial, and under provisions prohibiting special legislation and requiring separation of governmental powers.<sup>205</sup> This article does address each of these theories but will focus on challenges centered on right to a remedy/open courts, the *quid pro quo* category of due process, and state constitutional equal protection.

#### A. Right to a Remedy/Open Courts

"Right to remedy" language is often located in the "open courts" provisions of state constitutions and has sometimes been interpreted as ensuring a substantive remedy to litigants, not merely a guaranteeing that courthouse doors will remain open to citizens.<sup>206</sup> Right to remedy and open court provisions have ancient roots in the Magna Carta.<sup>207</sup> The current right to remedy/open courts provision in the Pennsylvania constitution, for example, is a remnant of the ancient language:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.<sup>208</sup>

The ancient language itself read:

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maxim that no one has a vested right in a rule of the common law). See *infra* n.307 and accompanying text. As the article will later argue, see *infra* Part V., *Duke Power* in fact endorsed heightened judicial scrutiny of tort modification (while denying it was doing so).

<sup>200</sup> See *Carson v. Maurer*, 424 A.2d 825, 830 (N.H. 1980) citing *Briscoe Co. v. Rutgers*, 327 A.2d 687, 690 (NJ 1974); *Hunter v. North Mason School Dist.*, 539 P.2d 845, 848 (Wash. 1975); see also *infra* Part IV.C.

<sup>201</sup> See Padgett, *supra* n.158 and accompanying text. It is a question for another day whether workers in any meaningful sense ever bargained. Early 20<sup>th</sup> century unions were involved in the discussion but I am not convinced that sufficiently large blocks of workers negotiated for the eventual bargain. See FISHBACK & KANTOR, PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION at 64-69.

<sup>202</sup> See generally Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2002).

<sup>203</sup> See *infra* n.238 and accompanying text

<sup>204</sup> *Id.*

<sup>205</sup> Goldberg, *The Constitutional Status of Tort Law*, *supra* n. 32, at 527

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1311. Or perhaps in one of its "restatements" by Coke in the Institutes. *Id.*

<sup>208</sup> Pennsylvania Constitution, Article I, Section 11

N[o] freeman shall be taken or imprisoned or disseised of any freehold, or liberties, or free customs, or outlawed, or banished, or in any other way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.<sup>209</sup>

Some state courts have concluded, primarily in the context of litigation over tort or medical malpractice reform, that the right to remedy/open courts language in their constitutions means that citizens should have a right to an adequate substantive remedy.<sup>210</sup> Some open courts provisions explicitly include the phrase “right to a remedy” but there are variations.<sup>211</sup> As already noted,<sup>212</sup> Florida’s courts have decided that Florida’s open courts provision establishes a doctrine of *quid pro quo*, a requirement that “vested” rights may not be modified unless a reasonable remedy is substituted for them.<sup>213</sup> Because some states afford citizens the practical equivalent of vested rights to remedies, some notable commentators have opined that individual rights are at times better protected by state constitutions than by their federal counterpart.<sup>214</sup>

“Right to remedy” and open courts arguments were featured prominently in *Smothers v. Gresham Transfer, Inc.*<sup>215</sup> In that case, a lube technician in a truck shop alleged that his employer “negligently allowed acid laden mist and fumes to drift into the shop area where he worked, causing harm to his respiratory system, skin, teeth and joints.”<sup>216</sup> He filed a workers’ compensation claim, which his employer’s insurance carrier denied.<sup>217</sup> Ultimately the Worker’s Compensation Board of the State of Oregon upheld the denial, finding that the technician’s work was not the “major contributing cause of his injuries,” and that he did not have “compensable injury” under the workers’ compensation statute.<sup>218</sup> Additionally, the technician could not bring a tort suit because of the exclusive remedy rule, and the trial court dismissed his complaint when he tried.<sup>219</sup> Thus the plaintiff in *Smothers* was in the same position as had been the Florida plaintiffs in *Westphal*<sup>220</sup> and *Kluger*.<sup>221</sup> Each of these plaintiffs was cut off from any remedy for personal

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<sup>209</sup> Chapter 29 of the 1225 version of Magna Carta *quoted in* Ned Miltenberg, *The Revolutionary ‘Right to a Remedy’*, TRIAL, MAR. 1998, at 48

<sup>210</sup> See e.g. *Condemarin v. University Hosp.*, 775 P.2d 348, 365 (Ut. 1989) (concluding that an arbitrary limit on tort damages awarded by juries impinged on both the right to a remedy and the right to a jury trial because it was the historic province of the jury to award damages.)

<sup>211</sup> There are twenty-seven state constitutions that require courts to be open, thirty-six that require justice to be administered promptly, twenty-seven that require justice to be administered without purchase or sale, thirty-four that require justice to be granted completely and/or without denial, and eleven that require justice to be delivered freely. Additionally, thirty-five states provide a right to a remedy, of which twenty-one require the remedy to be by due process or due course of law. Phillips, *The Constitutional Right to a Remedy*, n.6 at 1310 *citing* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES, app. 6 at 6-65 to 6-67 (3d ed. 2000)

<sup>212</sup> See *supra*. Sec. III.C

<sup>213</sup> See *Kluger v. White, supra.*, n.184, and accompanying text

<sup>214</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977)

<sup>215</sup> 23 P.3d 333 (Or. 2001)

<sup>216</sup> The appellate court below chronicled the facts at 941 P.2d 1065, 1066 (Or. 1997)

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See *supra*. n.167, and accompanying text.

<sup>221</sup> See *supra*. n.184, and accompanying text.

injury, in a sense a conceptually simpler scenario than one in which a plaintiff is attempting to argue she has been dispossessed of an adequate remedy.<sup>222</sup>

On appeal Smothers argued that the court's application of the Oregon exclusive remedy rule violated, among other things, the remedy clause of the Oregon Constitution.<sup>223</sup> The Oregon Court of Appeals rejected the argument.

The question in this case is whether the legislature, when it amended [the exclusive remedy rule], intended to declare that a work-related harm that is outside the definition of "compensable injury" in [the workers' compensation statute] is not a "legally cognizable" injury. If that was its intention, then there is no "right" on which a "deprivation of a remedy" argument could be predicated.<sup>224</sup>

The appellate court's response went directly to the heart of the matter. The only "rights" in question were statutory workers' compensation and tort rights, and, if the legislature wanted to extinguish either or both sets of rights, it had plenary power to do so.<sup>225</sup> It could not, of course, create a right and then deny a remedy,<sup>226</sup> but that was not the situation. While there may be no right without a remedy, there is also no remedy without a right.<sup>227</sup>

The Oregon Supreme Court reversed in the only way logically possible with the case being argued in this manner. The Court found the existence of a substantive right in the remedies clause of the state constitution and drew on a great deal of history in doing so. Magna Carta and the history of open courts and remedies provisions, the argument has gone, did not spring from out of thin air. As Thomas Phillips wrote, one of the most widespread and important of state constitutional provisions is "the right of access to the courts to obtain a remedy for injury."<sup>228</sup> This right to a remedy for injury derives from Magna Carta,<sup>229</sup> and the seventeenth century articulation of it from Lord Coke may be found in the constitutions of eleven states.<sup>230</sup> Both the Oregon court and scholars have traced a taxonomy of rights—that would have been familiar to the founders, adopters of the early remedy provisions—to Blackstone's Commentaries, in which the rights of persons at common law were divided into "absolute" and "relative."<sup>231</sup> Among the absolute rights were rights of personal security, personal liberty, and private property.<sup>232</sup> Absolute rights, according to Blackstone, could not be protected simply by declaring them; they had to be subject

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<sup>222</sup> Similarly, Oklahoma employees of opt-out employers may credibly argue that they have been dispossessed of a legal remedy for injury because there is no legal requirement under Oklahoma law that alternative benefit plans pay any specific amount or level of benefits.

<sup>223</sup> Article I, Section 10 of the Oregon Constitution states, "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

<sup>224</sup> 941 P.2d 1065, 1067-68

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Professor Bauman refers to this as a "circular maxim." John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 Wake Forest L. Rev. 237, 281 (1991)

<sup>228</sup> Phillips *The Constitutional Right to a Remedy* at 1310.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*: "That every person for every injury done him in his goods, land, or person, ought to have remedy by the course of the law of the land and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land."

<sup>231</sup> Phillips at 1321 *citing* Blackstone's Commentaries at 124.

<sup>232</sup> *Id.*

to vindication.<sup>233</sup> The “right to a remedy” was one of five subordinate rights allowing vindication of absolute rights.<sup>234</sup> Once a person suffered injury to one of those rights, an “adequate remedy” automatically attached.<sup>235</sup>

The Blackstone formulation was not conceived as “due process” protection because the threat of encroachment on rights was conceived to arise from the Crown and from private actors, not from the legislature.<sup>236</sup> Nevertheless, the right to a remedy existed within Blackstone’s “natural law” rights taxonomy. Phillips has argued persuasively that early-American tort cases were consistent with Blackstone’s absolute-relative right model.

In most early American cases, the courts were willing to supply a remedy for every right, whether created by common law or statute. But they were not bound to preserve any particular remedy or procedure for vindicating the right. As long as the new law preserved the injured person’s ability to vindicate his or her rights in court or provided an adequate substitute remedy, the right to a remedy was not violated. The courts also allowed legislatures to limit remedies derived from relative law, such as *respondeat superior*, in part because the injured person retained the right to obtain a judicial remedy against the individual who caused the injury, that is, the individual who violated the injured person’s absolute right to personal security.<sup>237</sup>

The Supreme Court’s opinion in *Smothers* followed a similar line of reasoning. It was the business of the court to trace the “right to a remedy” clause from its apparent origins in Magna Carta, through Lord Coke, William Blackstone, the early colonists, the Founders, and ultimately back to the Oregon Constitution, enacted in 1857.<sup>238</sup> It is a long story<sup>239</sup> at the culmination of which the court concluded,

As we have explained, the history of the remedy clause indicates that its purpose is to protect absolute common-law rights respecting person, property, and reputation, as those rights existed when the Oregon Constitution was drafted in 1857. The means for protecting those rights is the mandate that remedy by due course of law be available in the event of injury.<sup>240</sup>

From that resolution it was a short step for the court to conclude that *Smothers* had been deprived of his remedy. He was left with no remedy. Then the court went conceptually a step further. Not only was it impermissible to deprive a citizen of a remedy, it was equally

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *But see* Lord Coke’s controversial *Dr. Bonham’s Case*, 8 Co.Rep.114a, 77 Eng.Rep. 646 (C.P. 1610) (ruling that “in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void”)

<sup>237</sup> Phillips, *The Constitutional Right to a Remedy*.at 1331

<sup>238</sup> *Smothers v. Gresham Transfer*, *supra.*, 23 P.2d. at 340-51

<sup>239</sup> And one that is beyond the scope of my present inquiry. For a concise and penetrating account *see generally* Goldberg, *The Constitutional Status of Tort Law*, *supra.* n.32 at 560-568

<sup>240</sup> *Smothers v. Gresham Transfer*, *supra.*, 23 P.2d at 353

impermissible to deprive him of a plainly inadequate remedy. The court acknowledged the right of the legislature to alter law but imposed a limitation.

Although this court has held that the remedy clause preserves common-law rights of action, *id.*, it never has held that the remedy clause prohibits the legislature from changing a common-law remedy or form of procedure, attaching conditions precedent to invoking the remedy, or perhaps even abolishing old remedies and substituting new remedies. . . . That is, the court never has held that the remedy clause freezes in place common-law remedies. However, just as the legislature cannot deny a remedy entirely for injury to constitutionally protected common-law rights . . . neither can it substitute an “emasculated remedy” that is incapable of . . . restoring the right that has been injured.<sup>241</sup>

This line of thought reveals a conceptual linchpin between right to a remedy and *quid pro quo*. The remedy may be altered—adjusted for historical circumstances—but the right may not be annihilated, for it is absolute. Many courts have refined or disagreed with this line of reasoning. As Jennifer Friesen has explained:

At least three theoretical positions can be discerned from the various “tests” announced: the historically tied approach, “the “reasonable alternative” public policy approach, and the legislative power approach. The historically tied approach holds that the [open courts and remedies] clauses protect only common law causes of action that existed at the time of the adoption of the constitutional clause, which are preserved unless the legislature substitutes another adequate remedy or *quid pro quo* for the affected litigants. The public policy approach permits the legislature to limit any cause of action and remedy if it creates a reasonable alternative, but, even without creating a substitute, it may alter former rights if it acts for a very important reason or is responding to an overwhelming public need. The third theory allows legislatures the broadest power to alter common law rights and remedies by redefining the notion of legal injury.<sup>242</sup>

Utilizing this rubric reveals opinions from Florida and Oregon already discussed as utilizing primarily “historically-tied approaches.” Challenges to opt-out and significant incremental-erosional modifications to workers’ compensation statutes would probably have the greatest likelihood of success in jurisdictions in which courts have been sympathetic to such historical arguments in tort reform contexts. *Smothers*, for example, utilized a historically-tied approach to both presume that the essence of a common law right to a remedy must be preserved and to insist that any substitute remedy be adequate.

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<sup>241</sup> *Id.* at 354

<sup>242</sup> FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES, §6-2(c), *supra*. n.211, 6-9, *citing* as examples of historically tied approach *see* *Bryant v. Continental Conveyor and Equip. Co.*, 751 P.2d 509 (Ariz. 1988) and *Christianson v. Pioneer Furniture Co.*, 77 N.W. 174 (Wis. 1898); as examples of public policy approach *see* *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634 (W. Va. 1991) and *Robinson v. Charleston Area Medical Ctr., Inc.*, 414 S.E.2d 877 (W. Va. 1991); as examples of the legislative power approach *see* *Meech v. Hillhaven, West, Inc.*, 776 P.2d 488 (Mont. 1989).

The “public policy” approach may also be useful to opponents of opt-out and incremental-erosional workers’ compensation modifications because it requires that remedial substitutes for rights be “reasonable.” Yet this approach leaves open the possibility that substitution may lawfully be “unreasonable” when the legislature is acting for an important reason or responding to an overwhelming public need.<sup>243</sup> The question in these situations may be whether the burden is on the government to demonstrate the existence or severity of the public need. Finally, if a jurisdiction’s courts utilize the “legislative power” approach, it does not appear that adequacy or reasonableness will enter into a court’s analysis.<sup>244</sup>

Nevertheless, in all but legislative power jurisdictions it would seem likely that opt-out challengers would prefer development of a historically-tied narrative. As Professor John Bauman argued, states in which this approach is undertaken are in reality:

[S]ubjecting the statute to a form of substantive due process review. In substantive due process review, the court scrutinizes both the goal of the legislation, to determine whether the statute deals with a matter of legitimate (or even compelling) government interest, and then tests whether the means chosen are properly related to achieving that goal.<sup>245</sup>

It is likely true, as Professor Bauman has also observed, that “[t]he common law is not divine revelation, but rather a human artifact consciously chosen” and that “it is hard to decide exactly what common law is made fundamental by the [remedy] provision.”<sup>246</sup> However, courts using historically-tied approaches to remedies provisions appear to be employing a kind of originalism in discerning state-based absolute rights in the Blackstonian tradition. They are in a historical “construction zone” and arrive at such a point because “[c]onstruction becomes the focus of explicit attention when the meaning of the constitutional text is unclear, or the implications of that meaning are contested.”<sup>247</sup> Within that construction zone, the historical peculiarities of states are of significance and have predictably been creatively exploited. One imagines this venture will continue, particularly as scholarship mature on the origins of the “right to remedy” and open courts provisions.

Theories of legislative supremacy, on the other hand, challenge historically-tied attempts to ward off tort reform. Those theories hold that the authority of the legislature should govern absolutely in all areas not explicitly closed off by constitutional guarantee.<sup>248</sup> In a legislative supremacy environment no personal injury litigant will get anywhere unless persuading a court of explicit guarantees of remedies for personal injury, which will not exist. In *Meech v. Hillhaven West*,<sup>249</sup> for example, Meech sought “damages for wrongful termination from employment, breach of the implied covenant of good faith and fair dealing . . . intentional or negligent infliction of emotional distress . . . for allegedly oppressive, malicious, and unjustifiable conduct on the part of [his] employer . . . [and ultimately for] . . . wrongful discharge . . .”<sup>250</sup> Montana had enacted a

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<sup>243</sup> See *supra*. n.242 and accompanying text

<sup>244</sup> *Id.*

<sup>245</sup> Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, *supra*. at 262

<sup>246</sup> *Id.* at 283

<sup>247</sup> Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 538 (2013)

<sup>248</sup> See *supra*. n.242 and accompanying text

<sup>249</sup> 776 P.2d 488 (Mont. 1989), see *supra*. n.215

<sup>250</sup> *Id.* at 490.

Wrongful Discharge from Employment Act which by its terms “preempted” common law remedies.<sup>251</sup> Meech challenged the statutory preemption of his tort claims on several grounds, including under Montana’s unified constitutional “right to remedy” and “open courts” provision.<sup>252</sup> The Montana Supreme Court rejected the argument out of hand,

The legislature's exercise of its power to alter the common law supports in a large part our legal system . . . [M]uch of the legislation altering the common law concerns the legislature's decisions on the remedies, redress, or damages obtainable in various causes of action . . . Legislative decisions to expand liability to further various policy objectives are debated and passed almost routinely . . . for a variety of policy reasons, refuses to provide a cause of action, remedy and redress for every injury. This proposition is expressed in Latin as *damnum absque injuria*, meaning a “loss which does not give rise to an action for damages against the person causing it.” Black's Law Dictionary 345 (4th ed. 1979). The legislation at issue here similarly alters common-law rights and duties and arguably denies a cause of action, remedy, and redress for injuries recognized at common law. If Article II, § 16, guarantees a fundamental right to full legal redress as embodied in common-law causes of action, then a myriad of legislation altering common law in a restrictive manner, as well as the Act, denies this fundamental right.<sup>253</sup>

This is a robust statement of legislative supremacy. Essentially, the court held that, assuming the underlying substantive tort right is, or might at one time have been, considered “fundamental,” the legislature nevertheless had plenary authority to abolish it. On this view, no right is absolute.

Of course, courts need not and at times have not conceded that open courts or remedies provisions have any substantive component at all. It is worth noting that Oklahoma itself does not view the remedies clause as providing substance, so opt-out challengers there may find little solace in proceeding on such a theory. In *Adams v. Iten Biscuit Co.*,<sup>254</sup> the Oklahoma Supreme Court stated, in connection with the state constitutional remedy provision,

That this was a mandate to the judiciary and was not intended as a limitation upon the legislative branch of the government seems clear. Neither do we think it was intended to preserve a particular remedy for given causes of action in any certain court of the state, nor was it intended to deprive the Legislature of the power to abolish remedies for future accruing causes of action (where not otherwise specifically prohibited), or to create new remedies for other wrongs as in its wisdom it might determine.<sup>255</sup>

A number of states see matters in much the same way, and whether the remedies provision may be used to imply a substantive personal injury right of redress requires a state-by-state assessment.

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 495-96.

<sup>254</sup> 162 P. 938 (Ok. 1917)

<sup>255</sup> *Id.* at 942

## B. *State Quid Pro Quo*

*Quid pro quo* is essentially a due process concept,<sup>256</sup> so the article will address the theory in that manner, reserving traditional due process analysis for the next section on federal theories of restraint.<sup>257</sup> In the federal context it may be worth noting that the Supreme Court implicitly created *quid pro quo* as a matter of federal due process in *White*<sup>258</sup> and failed to reject the theory in *Duke Power*.<sup>259</sup>

Some states have adopted and developed the *quid pro quo* theory—that remedy for loss of an “important” common law right may not be dissolved by a legislature without provision of an adequate substitute—though the substitute may take on different forms. In *Kansas Malpractice Victims Coalition v. Bell*,<sup>260</sup> for example, an injured motorist challenged on constitutional grounds a provision of a Kansas automobile injury act<sup>261</sup> denying recovery to a victim unless damages exceeded a certain threshold. Setting its mood point in prefatory language the court said,

The Bill of Rights of the Kansas Constitution and the Bill of Rights of the United States Constitution are there to protect every citizen, including a person who has no clout, and the little guy on the block. They are there to protect the rights of a brain-damaged baby, a quadriplegic farmer or business executive, and a horribly disfigured housewife who is a victim of medical malpractice. They are not there to see that the will of the majority is carried out, but to protect the rights of the minority. It is the obligation of this court in each case to carry out its constitutional responsibility. With that obligation in mind, we now turn to the issues involved in the case now before us.<sup>262</sup>

Tracing a long line of Kansas cases,<sup>263</sup> the court set out a two-step analysis in which it first determined whether the plaintiff’s right to a remedy had been limited and then, finding that it had, moved on to assess whether the plaintiff had, notwithstanding the limitation, received from the legislature an adequate substitute remedy.<sup>264</sup> The court found that he had not.<sup>265</sup>

In *Texas Workers’ Compensation v. Garcia*,<sup>266</sup> the Texas Supreme Court considered a broad attack on the constitutionality of the 1989 amendment of the Texas Workers’ Compensation Act.<sup>267</sup> Various plaintiffs alleged that “provisions of the Texas Workers’ Compensation Act facially violate[d] the Texas Constitution’s guarantees of open courts, due course of law, equal protection,

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<sup>256</sup> See Jeffrey P. DeGraffenreid, *Testing the Constitutionality of Tort Reform with a Quid Pro Quo Analysis: Is Kansas’ Judicial Approach an Adequate Substitute for a More Traditional Constitutional Requirement?* 31 WASHBURN L. J. 314, 316 (1992).

<sup>257</sup> See *infra*. Part V.

<sup>258</sup> See *supra*. n.28 and accompanying text.

<sup>259</sup> See *infra*. n.335 and accompanying text.

<sup>260</sup> 757 P.2d 251 (Kan. 1988) *disapproved but not reversed* Bair v. Peck, 811 P.2d 1176, 1191 (1991)

<sup>261</sup> The Kansas Automobile Injury Reparation Act, §§40-3101-3121.

<sup>262</sup> *Kansas Malpractice Victims Coalition v. Bell*, *supra.*, 757 P.2d at 258.

<sup>263</sup> The court utilized a *quid pro quo* analysis as far back as 1914 when it upheld against an employee challenge the original Kansas workers’ compensation statute. In a sense current tort reform challenges were second generation *quid pro quo* attacks on negligence limitation.

<sup>264</sup> *Id.* at 352.

<sup>265</sup> *Id.*

<sup>266</sup> 893 S.W.2d 504 (Tex. 1995)

<sup>267</sup> *Id.* at 510

jury trial, and obligation of contract.”<sup>268</sup> The lower courts sustained most of the challenges and struck the Texas Act.<sup>269</sup> The Texas Supreme Court reversed but importantly accepted the premise that any modification of the workers’ compensation statute had to be reasonable in substituting statutory for common law remedies:

[L]egislative action withdrawing common-law remedies for well-established common-law causes of action for injuries to one’s “lands, goods, person or reputation” is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare.<sup>270</sup>

The Court concluded that it “must compare the current statute to the common law remedy, not to the previous statute. The open courts provision guarantees that a common law remedy will not be unreasonably abridged, not that the Legislature will not amend or replace a statute.”<sup>271</sup> Thus, the Court agreed on the critical *quid pro quo* point. However, having agreed on that point the Court nevertheless upheld the Texas Workers’ Compensation Act under the essential open courts challenge.<sup>272</sup> The gravamen of the Court’s argument was that in a majority of cases—even under modern negligence doctrine—injured workers could easily fail to prevail in negligence cases and the record in the current case suggested to the Court that workers would recover nothing in negligence in a large majority of cases:

Although the Legislature has softened the defense of contributory negligence by adopting comparative responsibility . . . and this Court has abolished the defense of assumption of the risk . . . an injured employee pursuing the common law remedy must still prove that the employer was negligent and that he or she was not more than 50 percent negligent. Although the trial court made no finding on the issue, there was evidence at trial that, even with these changes in the common law, injured employees pursuing negligence claims against their employers recover nothing in a large majority of cases. In comparison, the Act—carrying forward the general scheme of the former act—provides benefits to injured workers without the necessity of proving negligence and without regard to the employer’s potential defenses. In exchange, the benefits are more limited than the actual damages recoverable at common law . . . We believe this *quid pro quo*, which produces a more limited but more certain recovery, renders the Act an adequate substitute for purposes of the open courts guarantee.<sup>273</sup>

This contention by the Court nicely underscores the dilemma faced by injured workers’ advocates advancing *quid pro quo* arguments. A court may conclude that the remedy for a *quid*

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 516-17.

<sup>270</sup> *Id.* at 520 *citing* Trinity River Authority, 889 S.W.2d at 262 (quoting Lebohm v. City of Galveston, 275 S.W.2d 951, 955 (1955)). *Accord* Sax v. Votteler, 648 S.W.2d 661, 665 (Tex.1983); Waites v. Sondock, 561 S.W.2d 772, 774 (Tex.1977).

<sup>271</sup> *Id.* at 521

<sup>272</sup> *Id.* at 523

<sup>273</sup> *Id.* at 521

*pro quo* “gone bad” is to return to the negligence *status quo ante*. In fact, this was precisely the conclusion reached by the Florida trial judge in *Padgett*.<sup>274</sup> However, if the court in *Garcia* is correct, returning to the *status quo ante* might not be a good thing for plaintiffs. Ultimately, the *Garcia* court’s argument probably proves too much. Employers and their insurance carriers, having had the benefit of much more employer-friendly tort laws in the early twentieth century, were sufficiently concerned about the prospect of successful employee negligence suits to become proponents of workers’ compensation laws.<sup>275</sup> It seems hard to suggest that negligence law is better for employers now than it was in 1910. Though plaintiffs may experience significant difficulty in making out negligence claims employers continue to be liable for possibly crippling damage claims, only one of which may be sufficient for an employer to redevelop a preference for insurance premiums. Nevertheless, while the plaintiffs in *Garcia* may have lost the tactical contest they may have won a strategic victory. Time will tell.<sup>276</sup>

On the other hand, the California Supreme Court, in *Fein v. Permanente Medical Group*,<sup>277</sup> appeared to doubt the independent existence under due process of a *quid pro quo* requirement. In that case an attorney who in fact was suffering from a heart attack had been misdiagnosed on several occasions as experiencing only muscle spasms.<sup>278</sup> The attorney, who suffered harm from the misdiagnosis, sued in tort.<sup>279</sup> While prevailing at trial, the attorney was limited to noneconomic damages of \$250,000 under a tort reform statute.<sup>280</sup> The California Supreme Court rejected several challenges to this limitation concluding that the legislature’s decision to limit noneconomic liability was not irrational.<sup>281</sup> In a footnote, the Court suggested both that a *quid pro quo* theory was not applicable to its analysis and that its application to the case would not have changed the outcome. “Indeed, even if due process principles required some ‘quid pro quo’ to support the statute, it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs.”<sup>282</sup> This statement exemplifies a “societal *quid pro quo*” argument: although the individual plaintiff may suffer, society as a whole, and perhaps the plaintiff in other circumstances, benefits.<sup>283</sup> An illustrative societal *quid pro quo* argument is that tort reform may lead to lower aggregate health care costs despite having an adverse impact on an individual plaintiff in a particular case.<sup>284</sup>

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<sup>274</sup> See *Padgett, supra.*, n.128 and accompanying text

<sup>275</sup> FISHBACK & KANTOR, PRELUDE TO THE WELFARE STATE at 13

<sup>276</sup> On the other hand if negligence cases are routinely shunted into arbitration the underlying doctrinal question may not be addressed.

<sup>277</sup> 695 P.2d 665

<sup>278</sup> *Id.* at 669-670

<sup>279</sup> *Id.*

<sup>280</sup> The jury awarded \$24,733 for wages lost by plaintiff to the time of trial, \$63,000 for future medical expenses, and \$700,000 for wages lost in the future as a result of the reduction in plaintiff’s life expectancy. Finally, the jury awarded \$500,000 for “noneconomic damages,” to compensate for pain, suffering, inconvenience, physical impairment and other intangible damages sustained by plaintiff from the time of the injury until his death. *Id.* at 670

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 681 n.18. The Court seemed to be utilizing a societal *quid pro quo* argument and appeared to understand the U.S. Supreme Court as having done the same thing in *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978).

<sup>283</sup> See *e.g. Lucas v. U.S.*, 757 S.W.2d 687, 690 (Texas 1988) (rejecting argument)

<sup>284</sup> See *Wright v. Central Du Page Hospital Ass'n*, 63 Ill.2d 313, 328 (1976) (rejecting argument)

Some courts, of course, reject *quid pro quo* unapologetically, holding that the common law of England was “merely statutory” and thus modifiable at will by a legislature.<sup>285</sup> Where the common law has not been supplanted by statute, some courts argue that reading the open courts and remedy provisions as a limitation on legislative power would have the effect of reifying the law as of the date of adoption of the provisions,<sup>286</sup> some of which were not enacted until the gilded age and, one might note, at some distance from Coke, Blackstone, and Magna Carta. These cases seem to assume that recognition of due process *quid pro quo* or a constitutional right to a remedy for injury means that the legislature would be absolutely prevented from modifying or abolishing a remedy. As Tracy Thomas argued: “As a fundamental right . . . the right to a remedy can still be denied if that denial is necessary to a compelling state interest.”<sup>287</sup>

In sum, states vary significantly as to how or whether they recognize *quid pro quo* due process, and it is difficult to formulate general, multistate conclusions about the viability of the theory.

### C. State Equal Protection

Another constitutional theory that opt-out challengers may attempt to utilize in challenging severe limitations to personal injury remedies is equal protection. Most states follow the federal courts’ approach to equal protection analysis.<sup>288</sup> On the easiest rendering of federal law, because the right to a recovery for physical injury has not been deemed fundamental, and physically injured workers or persons do not make up a traditional suspect or quasi-suspect classification,<sup>289</sup> state laws applicable to them are subject only to deferential rational basis review. “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>290</sup> However, not all state courts take this path with respect to interpretations of the equal protection provisions of their own constitutions.

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<sup>285</sup> *Gourley ex rel. Gourley v. Nebraska Methodist Health System, Inc.*, 265 Neb. 918, 952 (2003); see generally *Adams v. Children’s Mercy Hospital*, 832 S.W.2d 898, 906 (Mo. 1992), *overruled on other grounds*, 376 S.W. 3d 633 (Mo. 2012) (“Texas–Florida interpretation views the common law as an inviolate body of law, rather than as a starting point from which judicial declarations are subject to modification by legislative policy choices and subsequent judicial decisions necessary to meet the needs of a changing society.”)

<sup>286</sup> See *Jones v. State Board of Medicine*, 97 Idaho 859, 864 (1976) (rejecting *quid pro quo* altogether and adopting reasoning of Colorado courts that because state constitution did not adopt common law of England state may modify it at will).

<sup>287</sup> Tracy A Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy under Due Process*, 41 SAN DIEGO L. REV. 1643 (2004)

<sup>288</sup> See *Craig v. Boron*, 429 U.S. 190 (1976) (striking on equal protection grounds an Oklahoma statute prohibiting the sale of “nonintoxicating” 3.2% beer to males under the age of 21 but allowing females over the age of 18 to purchase it and clarifying the modern tripartite equal protection analysis)

<sup>289</sup> See Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 997 (2002) (“In sum, equal protection incorporation would certainly treat as presumptively suspect discrimination based on religion, state origin, race, color, previous condition of servitude, and sex. The version of equal protection incorporation that I favor would also treat age discrimination as suspect, and might apply to some laws that disadvantage the poor as well. A remaining question is whether adopting equal protection incorporation means that no categories beyond those expressly singled out by the constitutional text are presumptively invalid.”)

<sup>290</sup> *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (internal citations omitted).

In *Carson v. Mauer*,<sup>291</sup> the New Hampshire Supreme Court took the view that “the right to recover for personal injuries is an important substantive right.”<sup>292</sup> In *Carson*, the New Hampshire Supreme Court struck several provisions of a medical malpractice statute.<sup>293</sup> Among the challenges to the statute was that it violated equal protection under the state constitution.<sup>294</sup> The Court reaffirmed that, just as was the case with federal court review of the Equal Protection clause of the U.S. Constitution, it would not “[i]n the absence of a ‘suspect classification’ or a ‘fundamental right’ . . . second-guess the legislature as to the wisdom of or necessity for legislation.”<sup>295</sup> Thus, the Court accepted the factual predicates upon which the legislature had concluded that medical malpractice reform was necessary.<sup>296</sup> The *Carson* court also acknowledged that the U.S. Supreme Court had applied a “substantial relationship” test—a requirement that statutory classifications rest upon some ground of difference having a fair and substantial relation to the object of the legislation—only “to cases involving classifications based upon gender and illegitimacy.”<sup>297</sup> Nevertheless the court concluded,

Although the right to recover for personal injuries is not a “fundamental right,” it is nevertheless an important substantive right . . . In *Estate of Cargill v. City of Rochester*, supra . . . , we applied the rational basis test in evaluating classifications which, like those in [the statutory provision under review], place restrictions on an individual's right to recover in tort. We now conclude, however, that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.

The court recognized that it was applying scrutiny exceeding that applied in connection with Equal Protection review under the U.S. Constitution but said, “[W]e are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires.”<sup>298</sup> According to the Court, the middle-level tier of review under which encroachments on personal injury rights had to be assessed required that legislation be “reasonable, not arbitrary,

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<sup>291</sup> 424 A.2d 825 (N.H. 1980) *reaffirmed* *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991) *overruled on other grounds* *Community Resources for Justice, Inc., v. City of Manchester*, 917 A.2d 707 (N.H. 2007)

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 829:

The statute in question is part of an effort by the legislature to address the problems of the medical injury reparations system. In enacting [the statute], the legislature set forth rigorous standards for qualified expert testimony, created a two-year statute of limitations applicable to most medical malpractice actions, required that notice of intent to sue be given at least sixty days before commencing the action, prohibited the statement of the total damages claimed as an ad damnum or otherwise, abolished the collateral source rule, limited the amount of damages recoverable for non-economic loss to \$250,000, empowered the court to order periodic payments of any future damages in excess of \$50,000, and established a contingent fee scale for attorneys in medical malpractice actions.

<sup>294</sup> *Id.* at 831

<sup>295</sup> *Id.* citing *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.”<sup>299</sup>

Although *Carson* has subsequently been reversed on other grounds,<sup>300</sup> the “important substantive right” formulation continues to trigger intermediate scrutiny in New Hampshire.<sup>301</sup> Thus, legislative enactment of workers’ compensation opt-out, in conjunction with retaining the exclusive remedy rule, would almost certainly face heightened judicial scrutiny in New Hampshire, with the state government being required to justify the *de facto* elimination of the workers’ compensation remedy.

Not all state courts agree that the right to recover for personal injuries is sufficiently important to trigger heightened scrutiny under the equal protection provisions of their state constitutions when the right suffers interference. In *Morris v. Savoy*,<sup>302</sup> for example, the Ohio Supreme Court considered a constitutional challenge to a medical malpractice statute.<sup>303</sup> Although striking two of the challenged provisions on due process grounds,<sup>304</sup> the Court rejected the plaintiffs’ equal protection challenge.<sup>305</sup> In the due process portion of its analysis the Court held that the statute was “unconstitutional because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary.”<sup>306</sup> The Court nevertheless rejected the equal protection challenge because “the statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective.”<sup>307</sup> These conclusions seem more than a little inconsistent. Yet *Carson*<sup>308</sup> had also been willing to accept unflinchingly the legislative facts surrounding the involved statute’s enactment as it simultaneously rejected as arbitrary the conclusions flowing from those facts.<sup>309</sup> Apparently irrational application of presumptively valid facts can provide sufficient reason for rejecting legislative conclusions, but the principle is somewhat confounding.

*Morris* may be more indicative of how state courts are presently likely to analyze equal protection challenges.<sup>310</sup> In workers’ compensation contexts there have been few successful equal protection challenges by plaintiffs or defendants. The reason for this is likely that the public policy rationale at the time of the enactment of workers’ compensation statutes would probably have

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<sup>299</sup> *Gonya v. Commissioner, New Hampshire Insurance Dept.*, 899 A.2d 278, 289 (N.H. 2006) *citing Carson*, 424 A.2d at 831

<sup>300</sup> *Community Resources for Justice, Inc. v. City of Manchester*, 917 A.2d 707, 721 (N.H. 2007) (clarifying that the government had the burden of “demonstrate[ing] that the challenged legislation meets this [intermediate scrutiny] test . . . [and] may not rely upon justifications that are hypothesized or ‘invented *post hoc* in response to litigation,’ nor upon ‘overbroad generalizations.’”

<sup>301</sup> *See supra*. n.265; see also *Gonya v. Commissioner, New Hampshire Insurance Dept.*, 899 A.2d at 289

<sup>302</sup> 576 N.E.2d 765 (Oh. 1991)

<sup>303</sup> *Id.* at 767. The challenge was to certain liability caps and imposition of a collateral source rule. *Id.*

<sup>304</sup> *Id.* at 771

<sup>305</sup> *Id.* at 772

<sup>306</sup> *Id.* at 771

<sup>307</sup> *Id.* at 770

<sup>308</sup> *See supra*. n.291 and accompanying text

<sup>309</sup> *Carson, supra.*, 424 A.2d at 838: “A statute which singles out seriously injured malpractice victims whose future damages exceed \$50,000 and requires one class to shoulder the burden inherent in a periodic payments scheme from which the general public benefits offends basic notions of fairness and justice [and] . . . is an *unreasonable* exercise of the legislature’s police power and violates the State’s equal protection guarantees.” (emphasis supplied)

<sup>310</sup> *Morris* itself cites several cases which declined to apply heightened scrutiny on an equal protection theory. *See e.g. Richardson v. Carnegie Library Restaurant, Inc.*, 763 P.2d 1153, 1159 (N.M. 1988); *Etheridge v. Medical Center Hospitals*, 376 S.E. 2d 525, 534 (Va. 1989); and *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 597 (Ind. 1980)

survived what we now call strict scrutiny, let alone surviving more deferential standards of review.<sup>311</sup> The major defect with respect to equal protection analysis is its all-or-nothing character under either the strict scrutiny or rational basis tests. As Laurence Tribe has written in explaining why some courts have taken the New Hampshire intermediate scrutiny approach displayed in *Carson*,

[An] all-or-nothing choice between minimum rationality and strict scrutiny ill-suits the broad range of situations arising under the equal protection clause, many of which are best dealt with neither through the virtual rubber-stamp of truly minimal review nor through the virtual death-blow of truly strict scrutiny, but through methods more sensitive to risks of injustice than the former and yet less blind to the needs of governmental flexibility than the latter.<sup>312</sup>

Ultimately most courts employing equal protection analysis would probably defer to legislative fact-finding, a development likely to put plaintiffs at a significant disadvantage. Courts may accept uncritically legislative fact-finding asserting that workers' compensation modifications like opt-out are economically beneficial. If those courts additionally apply deferential rational basis review, it is less likely that legislative fact determinations would be disturbed. If, however, legislatures had the burden of showing a substantial relationship between the policy problem and the chosen legislative solution, cases might receive a very different judicial reception. For example, if alternative benefit plans under opt-out deliver fewer benefits to injured workers—particularly to those who are permanently disabled—then the increased costs to workers must either be absorbed by workers or shifted elsewhere. Courts might then insist on an explanation of states' analyses of such large problems.

On the other hand, a court might strike a tort-reform statute even under a “bare” rational basis analysis. In *Estate of McCall v. United States*,<sup>313</sup> for example, the Florida Supreme Court struck Florida's statutory cap on wrongful death non-economic damages recoverable in a medical malpractice action.<sup>314</sup> In that case, McCall died as a result of negligent medical treatment during

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<sup>311</sup> As John Fabian Witt wrote in *The Accidental Republic* the workplace injury situation in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries was dire:

At the turn of the century, one worker in fifty was killed or disabled for at least four weeks each year because of a work-related accident. Among the population as a whole, roughly one in every thousand Americans died in an accident each year. For those who worked in dangerous industries, accident rates were considerably higher. In 1890 alone, one railroad worker in every three hundred was killed on the job; among freight railroad brakemen, one out of a hundred died in work accidents. Nonfatal accident rates, though more difficult to estimate, appear to have been much higher. By one contemporary estimate, no fewer than 42 percent of railroad workers involved in the day-to-day operation of trains in the state of Colorado were injured on the job each year. The most extraordinary rates of death and injury appear to have occurred in the anthracite coal mines of eastern Pennsylvania during the 1850s and 1860s, where each year 6 percent of the workforce was killed, 6 percent permanently crippled, and 6 percent seriously but temporarily disabled.

WITT, *THE ACCIDENTAL REPUBLIC* *supra.* n.41, 2-3

<sup>312</sup> *Richardson v. Carnegie Library Restaurant, Inc.*, *supra.*, 763 P.2d at 1163 *citing* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 16–32, at 1609–10 (2d. ed. 1988)

<sup>313</sup> 134 So.3d 894 (Fla. 2014)

<sup>314</sup> *Id.* at 903

and after childbirth by Air Force medical personnel.<sup>315</sup> Her survivors filed a wrongful death action under the Federal Tort Claims Act in a federal district court alleging medical malpractice.<sup>316</sup> The court found that the United States was liable, that the plaintiffs' economic damages were \$980,462.40 and that their noneconomic damages were \$2 million.<sup>317</sup> Notwithstanding these findings the court limited the plaintiffs' recovery of wrongful death noneconomic damages to \$1 million under Florida's statutory cap on wrongful death noneconomic damages based on medical malpractice claims,<sup>318</sup> and denied a motion challenging the constitutionality of Florida's wrongful death statutory cap under both the Florida and United States Constitutions.<sup>319</sup> On appeal to the Eleventh Circuit Federal Court of Appeals, the plaintiffs challenged the trial court's rulings, and specifically contended that the statutory cap violated the Equal Protection Clause of the Fourteenth Amendment.<sup>320</sup> The Eleventh Circuit affirmed application of the Florida damages cap but granted a motion to certify four questions to the Florida Supreme Court including the question whether the cap violated equal protection.<sup>321</sup> The Court struck the cap under equal protection analysis applying the rational basis test,

[The cap] has the effect of saving a modest amount for many by imposing devastating costs on a few—those who are most grievously injured, those who sustain the greatest damage and loss, and multiple claimants for whom judicially determined noneconomic damages are subject to division and reduction simply based upon the existence of the cap. Under the Equal Protection Clause of the Florida Constitution . . . we hold that to reduce damages in this fashion is not only arbitrary, but irrational, and we conclude that it “offends the fundamental notion of equal justice under the law.”<sup>322</sup>

In an unusual dissection of legislative findings, the court went to some lengths to dispute the existence of a medical malpractice crisis, a cross examination culminating in the following statement:

Thus, even if there had been a medical malpractice crisis in Florida at the turn of the century, the current data reflects that it has subsided. No rational basis currently exists (if it ever existed) between the cap imposed . . . and any legitimate state purpose. . . At the present time, the cap on noneconomic damages serves no purpose other than to arbitrarily punish the most grievously injured or their surviving family members. Moreover, it has never been demonstrated that there was a proper predicate for imposing the burden of supporting the Florida legislative scheme upon the shoulders of the persons and families who have been most severely injured and died as a result of medical negligence. Health care policy that relies upon discrimination against Florida families is not rational or reasonable when it attempts to utilize aggregate caps to create unreasonable classifications. Accordingly, and

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<sup>315</sup> *Id.* at 898-899

<sup>316</sup> *Id.* at 899

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 903

for each of these reasons, the cap on wrongful death noneconomic damages in medical malpractice actions does not pass constitutional muster.<sup>323</sup>

Litigants in an equal protection jurisdiction like Florida could expect a lively contest of workers' compensation opt-out to the extent it both maintained the exclusive remedy rule and denied access to a workers' compensation statute.

#### D. *Section Conclusion*

The foregoing discussion disclosed a great deal of variation on state judicial responses to plaintiffs' attempts at restraining legislative initiatives to reduce personal injury remedies. Not surprisingly this kind of variation has led to a corresponding variation in litigation environments for both tort and workers' compensation litigants throughout the United States. By the end of the 1960s, this patchwork of uneven state court protections had led to a perhaps predictable race to the bottom. The situation eventually compelled President Nixon to convene a bi-partisan commission of experts to study and make recommendations on the apparent breakdown of state-based workers' compensation.<sup>324</sup> The commission unanimously reported:

The inescapable conclusion is that State workmen's compensation laws in general are "inadequate and inequitable." The report listed nineteen "essential recommendations," all of which focused on expanding benefits to workers: eight recommendations dealt with expanded coverage; nine with increased disability benefits; and two with improvements to medical and rehabilitation benefits. Based on an insurance industry analysis, the National Commission estimated that the cost of those expanded benefits would mean that the average employer would pay 1.5% of payroll (up from 1.1%) toward workers' compensation insurance. The Commission predicted that these increased benefits would raise total insurance costs less than 50% in the vast majority of states.<sup>325</sup>

For the following decade:

. . . most states enacted legislation liberalizing benefits to workers—perhaps partly in response to the Commission's recommendation that workers' compensation should be federalized if states failed to expand benefits. Average state compliance increased from a level of 6.8 out of the nineteen 'essential recommendations' in 1972 to an average of 12.1 in 1982, when the national trend toward expansion appeared to level off substantially short of the recommended goals.<sup>326</sup>

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<sup>323</sup> *Id.* at 914-915.

<sup>324</sup> The commission was established in Section 27 of the newly-enacted OSH Act of 1970. See John F. Burton, Jr., *The National Commission on State Workmen's Compensation Laws: Some Reflections by the Former Chairman*, 40 IAIABC Journal 15 (2003) available at [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2013/03/workers\\_compensationcommitteeandmeeting/reflections\\_burton.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/workers_compensationcommitteeandmeeting/reflections_burton.authcheckdam.pdf).

<sup>325</sup> Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation Reform*, 50 RUTGERS L. REV. 657, 683 (1998)

<sup>326</sup> *Id.*

An expanding opt-out movement reveals a pendulum that has once again swung wildly in the opposite direction. It can hardly be wondered why tort and workers' compensation modifications, and responses to those modifications, move in waves. In sum, no stabilizing legal consensus across states as to the importance of personal injury rights has emerged. Vacillation seems at once moral and economic. Our pocketbooks direct elected representatives to rein in business costs as aggressively as possible. Our moral sensibility periodically intervenes and we perceive the crudity of a sweeping directive. Unsurprisingly, in the face of the 1960s workers' compensation race to the bottom, the National Commission seriously entertained the need for federal intervention if states did not voluntarily enact adequate systems.<sup>327</sup> Opt-out does not suggest a commitment to adequacy.

## V. SUBSTANTIVE DUE PROCESS UNDER THE U.S. CONSTITUTION

An additional potential check on the power of states to severely interfere with the right of an individual to a remedy for invasions of personal security through mechanisms such as workers' compensation opt-out is the federal due process clause of the Fourteenth Amendment, "nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."<sup>328</sup> In addition to imposing procedural restraints on states in connection with deprivations of life, liberty, or property,<sup>329</sup> the Supreme Court has established that the clause may apply to the substance of state law touching on various rights.<sup>330</sup> The perennial question has been which state rights are delimited by the clause, and the Court has vacillated between a narrow and broader vision of the scope of the clause.<sup>331</sup> In current times the Court seems to have settled upon an historical "rooting" of the clause's meaning and application.<sup>332</sup>

In this section the article will first discuss a federal *quid pro quo* conception of due process and will contend that the Supreme Court has failed to discredit *quid pro quo* despite having ample opportunity to do so. The section will proceed to discuss the implications of a still viable federal *quid pro quo* theory. Then the section will juxtapose *quid pro quo* with "historical" due process analysis.<sup>333</sup> The section will conclude by arguing that the right to a remedy for personal injury is important and strongly implied by both the structure and the social contract nature of our legal system and therefore should be recognized as protected by notions of structural due process.

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<sup>327</sup> David B. Torrey, *The Federalization/Federal Standards Issue: A Short History Before and After NFIB v. Sibelius*, slip op. at 6 ABA WORKERS' COMPENSATION SECTIONS 2013 MIDWINTER SEMINAR AND CONFERENCE available at [http://www.davetorrey.info/files/ABA\\_WC.CoralGables.Torrey.Paper.No.2\(Federalization\).pdf](http://www.davetorrey.info/files/ABA_WC.CoralGables.Torrey.Paper.No.2(Federalization).pdf) citing MICHAEL J. GRETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE, p.86 (Yale 1999).

<sup>328</sup> U.S. CONSTITUTION, FOURTEENTH AMENDMENT

<sup>329</sup> See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976)

<sup>330</sup> See e.g. *Rochin v. California*, 342 U.S. 165 (1952) (applying clause to forbid forcible physical seizure of evidence from

<sup>331</sup> Steven G. Calabresi, *Substantive Due Process after Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1518 (2008)

<sup>332</sup> *Id.* (Noting that historical due process had purported to limit substantive due process to only those rights that are deeply rooted in history and tradition and contending that the Supreme Court has been returning to such a position).

<sup>333</sup> See *Washington v. Glucksberg*, 521 U.S. 702 (1997)

### A. *Federal Quid Pro Quo*

As previously noted, the U.S. Supreme Court, when upholding workers' compensation statutes in the twentieth century, appeared to assume the necessity of *quid pro quo*, that common law tort rights could not be displaced unless replaced by reasonable or adequate substitutes.<sup>334</sup> However, in *Duke Power Co. v. Carolina Environmental Study Group*,<sup>335</sup> a case decided in 1978, the nuclear power industry persuaded Congress to place a cap on damages resulting from any future catastrophic nuclear accident of \$560 million per incident.<sup>336</sup> The plaintiffs in *Duke Power* challenged the cap on a number of theories including that such a limitation of liability violated federal substantive due process.<sup>337</sup> The Court, in rejecting the due process claim, stated, "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy," but then went to some length to demonstrate that the scheme in question did in fact provide a reasonably just substitute remedy.<sup>338</sup>

*Duke Power* involved preemption of state law by federal atomic power policy where the risk of injury was remote.<sup>339</sup> It was generally understood that in the event of a catastrophic nuclear incident victims' losses would ultimately be underwritten by the U.S. Government, so there was no genuine question of injury benefit elimination.<sup>340</sup> The circumstances were unique and distinguishable from a broad, state-law swap of tort for workers' compensation rights or the wholesale abrogation of a well-established right by a legislature. Despite this dissimilarity, it is hard to escape the impression that the Court was subjecting the Price-Anderson Act to heightened scrutiny. Indeed, the Court cited with approval and explicitly contended that *Duke Power* was consistent with, *White*:

The logic of [*White*] would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a

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<sup>334</sup> See *supra*. n.28 and accompanying text

<sup>335</sup> 438 U.S. 59 (1978)

<sup>336</sup> *Id.* at 64-65:

In its original form, the Act limited the aggregate liability for a single nuclear incident to \$500 million plus the amount of liability insurance available on the private market—some \$60 million in 1957. The nuclear industry was required to purchase the maximum available amount of privately underwritten public liability insurance, and the Act provided that if damages from a nuclear disaster exceeded the amount of that private insurance coverage, the Federal Government would indemnify the licensee and other "persons indemnified"<sup>3</sup> in an amount not to exceed \$500 million. Thus, the actual ceiling on liability was the amount of private insurance coverage plus the Government's indemnification obligation which totaled \$560 million.

<sup>337</sup> *Id.* 82-93

<sup>338</sup> "The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the \$560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause." *Id.* at 93.

<sup>339</sup> *Duke Power*, *supra.*, 438 U.S. at 64

<sup>340</sup> *Id.*

catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the \$560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.<sup>341</sup>

This rhetoric does not have the feel of a “rational basis” opinion extolling the virtues of legislative supremacy. On the contrary, the language seems quite justificatory. At the very least, it seems hard to draw from the “reasonably just substitute” language a conclusion that the Court once and for all had slammed the door on *quid pro quo* due process analyses.

Seven years later the Court dismissed a petition for a writ of certiorari in *Fein v. Permanente Medical Group*,<sup>342</sup> discussed earlier in this article.<sup>343</sup> The petition challenged on federal due process grounds caps on medical malpractice liability in connection with noneconomic damages. As may be recalled, the California Supreme Court specifically rejected the existence of a *quid pro quo* due process theory.<sup>344</sup> Justice Stevens dissented to the dismissal contending that the Court had never decided the federal *quid pro quo* issue,

Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the “malpractice crisis,” it is likely that more States will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary.<sup>345</sup>

Although it might be argued that the dismissal decided the *quid pro quo* issue,<sup>346</sup> it does not appear the Court has thereafter had occasion to address *quid pro quo*; nor has the issue been discussed in

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<sup>341</sup> *Id.* at 93

<sup>342</sup> 695 P.2d 665 *cert. denied* 474 U.S. 892 (1985)

<sup>343</sup> *See supra.* n.277 and accompanying text

<sup>344</sup> *See supra.* n.282 and accompanying text.

<sup>345</sup> *See Fein, supra.*, 474 U.S. at 892, *supra.* n.342

<sup>346</sup> The Court has held that “summary dismissals are, of course, to be taken as rulings on the merits, in the sense that they rejected the specific challenges presented in the statement of jurisdiction and left undisturbed the judgment appealed from.” *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979). Summary dismissals do not, however, have the same precedential value as does an opinion of the Court after briefing and oral argument on the merits. *Neely v. Newton*, 149 F.3d 1074, 1079 (10th Cir. 1998) (“The Supreme Court has cautioned that for purposes of determining the binding effect of a summary action, the action should not be interpreted as adopting the rationale of the lower court, but rather as affirming only the judgment of that court.”). “Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction.” *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). And “[t]hey do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.” *Id.* “[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise.” *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

the federal courts as if it had been resolved. If *White* is dead, neither *Duke Power* nor *Fein Permanente* could have killed it.

It has been well-argued that the *quid pro quo* test can be inflexible and can fail to distinguish clearly between floor and ceiling challenges to reform, or to help courts in distinguishing precisely between particular kinds of tort reforms.<sup>347</sup> Yet there seems little doubt that *quid pro quo* is routinely discussed when courts become uncomfortable with threats to obviously important rights.

#### B. *Ramifications of a Still-Alive Quid Pro Quo: Revisiting Opt-Out*

If workers' compensation opt-out is recast as personal injury opt-out, the *quid pro quo* issue is whether courts will allow legislatures to grant private injurers tort immunity, and whether such an arrangement is a "reasonably just" substitute for tort rights. The Supreme Court has hinted at the ceiling of the Due Process Clause in *quid pro quo* contexts:

The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the \$560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.<sup>348</sup>

If that is the ceiling, the question is where this leaves the floor of *quid pro quo*. Opt-out "alternative benefit plans" appear to set no floor. There is no requirement that the plans pay any minimum level of benefits. In Oklahoma, alternative plans are required to pay the same "forms" of benefits as those required under the workers' compensation statute.<sup>349</sup> The statute requires payment of specified benefits for total disability, for partial disability, and for medical treatment. In Tennessee, critics allege that the proposed opt-out bill, S.B.721, leaves critical substantive workers' compensation decisions exclusively within the discretion of employers: coverage of medical expenses, selection of medical providers, deciding whether to end or continue benefits, and whether to attempt dispute resolution.<sup>350</sup> No appeal of eligibility determinations is mentioned anywhere in the bill. Thus, the bill would apparently not confer plan participants with *rights* to contest substantive determinations under an alternative benefit plan.<sup>351</sup> No procedures for dispute resolution are set forth in the bill and no procedures for selection of claim dispute factfinders are identified. Unlike the Oklahoma statute, the Tennessee bill would *not* retain the workers' compensation exclusive remedy rule, but the right to recover under Tennessee tort law would

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<sup>347</sup> Goldberg, *The Constitutional Status of Tort Law*, *supra.* n.32 at 613.

<sup>348</sup> *Duke Power*, *supra.*, 438 U.S. at 93

<sup>349</sup> *See supra.* n.120

<sup>350</sup> STATEMENT OF THE AMERICAN INSURANCE ASSOCIATION: LEGISLATION PERMITTING EMPLOYER OPT-OUT OF THE TENNESSEE WORKERS' COMPENSATION SYSTEM, *supra.* n.59 at 36.

<sup>351</sup> The bill does not provide for internal review of determinations and likely contemplates that all actions for non-negligent breach will be brought under ERISA.

apparently be modified under the bill.<sup>352</sup> No right to sue would exist if the employee “fails to follow instructions and rules” or is injured by “hazards that are commonly known and appreciated” or if the injury is caused by “failure to follow available safe alternatives.”<sup>353</sup> Thus employers would be afforded several affirmative defenses seemingly of the type that formed the original rationale for states adopting workers’ compensation in the first place.<sup>354</sup>

In a close study of Texas alternative benefit plans, Professor Alison Morantz found that, although employees did not have to go through benefit waiting periods under the plans,

Yet in other respects—for example, the commonplace twenty-four-hour reporting deadlines, absence of employee choice over medical providers, absence of any permanent partial or permanent total disability coverage, and prevalent caps on total benefits—such plans appeared less favorable to employees. Moreover, presumably in an effort to curb tort liability, a very high fraction (about 85 percent) of nonsubscriber plans channeled disputes to mandatory arbitration. Not only did virtually all companies deem their programs to be a success and report cost savings, but most were pleasantly surprised by the magnitude of these savings, which reportedly exceeded (on average) 50 percent across all industries.<sup>355</sup>

Thus, under the alternative plans that Professor Morantz analyzed entire classifications of the most seriously injured workers were not eligible for permanent disability benefits and—if they had signed on to an arbitration arrangement as a condition of participating in such a plan—could also not pursue a tort claim. If it is a constitutional requirement under federal *quid pro quo* due process for a state legislature to provide a reasonable alternative to a tort remedy, opt-out might have a very difficult time surviving heightened judicial scrutiny.

### C. *Quid Pro Quo and Historically-Rooted Rights*

*Quid Pro Quo* may possibly be understood as an inchoate type of historical due process analysis. The original workers’ compensation Grand Bargain was understood as a swap of important rights and was historical in at least two senses. In the first place, the swap itself is a century old and has therefore itself become an important part of history and tradition. Secondly, the implication behind the bargain is that only a reasonable set of rights could be substituted for a

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<sup>352</sup> Economic damages would apparently be capped at \$1,000,000 per employee. S.B. 721, 50-10-108(b)(1) available at <http://www.capitol.tn.gov/Bills/109/Bill/SB0721.pdf> (last accessed January 5, 2016)

<sup>353</sup> S.B. 721, 50-10-108 available at <http://www.capitol.tn.gov/Bills/109/Bill/SB0721.pdf> (last accessed January 5, 2016)

<sup>354</sup> See DUFF, *WORKERS’ COMPENSATION LAW* at 6.

<sup>355</sup> Alison Morantz, *Opting out of Workers’ Compensation in Texas, A Survey of Large, Multistate Nonsubscribers* in *REGULATION vs. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 200* (University of Chicago Press 2009). The respondents in the study reported high satisfaction with the magnitude of their cost savings. They were clearly winners under the system. Frankly, it seems a bit pointless to discuss how the plans may be better in some respects than workers’ compensation in some respects once it is understood that they eliminate permanent benefits. That qualification dwarfs everything else. It is also true, however, that Texas had variable injury expense until about fifteen years ago despite operating an opt-out system. Then costs began to descend. *See id.* at 201-202. Although the reasons for this are not yet clear, it is hard to ignore the Supreme Court’s intervening application of compulsory arbitration under the Federal Arbitration Act to employment in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)

tort-based right to a remedy for personal injury, a right that is difficult not to see through Blackstonian lenses.<sup>356</sup>

In *Washington v. Glucksberg*,<sup>357</sup> Chief Justice Rehnquist articulated what has become a common formulation in the Supreme Court's historical substantive due process doctrine:

. . . [W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.<sup>358</sup>

In *McDonald v. City of Chicago*,<sup>359</sup> a dissenting Justice Breyer warned against "the reefs and shoals that lie in wait for those nonexpert judges who place virtually determinative weight upon historical considerations."<sup>360</sup> Nevertheless, it seems difficult to avoid exploration of the historical dimensions of personal injury remedies in light of *Glucksberg* and its progeny. The inquiry resembles this article's state law "right to a remedy" discussion.<sup>361</sup> The heart of the matter is whether the right to a remedy for personal injury—a right to redress—is "fundamental" or even important. If it is difficult to identify an explicitly deeply-rooted historical right to a remedy for personal injury (within or outside a workplace) the matter can hardly be said to be resolved because:

. . . the most fundamental rights are those that no government of the people would contemplate abridging—it is doubtful that many courts or legislatures have discussed whether the government can determine whether we are allowed to breathe air, but this does not make our access to oxygen any less grounded in history.<sup>362</sup>

More to the point, the entire discussion of *quid pro quo* in *White* underscores that at least at a certain juncture in history the Supreme Court probably suspected the right to a remedy for physical injury was of heightened importance. Whether that sense of importance was coming from the due process clause or from elsewhere in the Fourteenth Amendment is difficult to say. The architects of the Fourteenth Amendment's privileges and immunities clause, for example, had the benefit of Bushrod Washington's 1823 interpretation of the Privileges and Immunities clause of Article IV of the Constitution. In *Corfield v. Coryell*,<sup>363</sup> plaintiffs challenged a New Jersey statute forbidding out of state persons from gathering clams and oysters. Washington rejected the claim that the law ran afoul of the Privileges and Immunities clause:

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<sup>356</sup> Goldberg, *The Constitutional Status of Tort Law*, *supra*. n.32 at 545.

<sup>357</sup> 521 U.S. 702 (1997).

<sup>358</sup> *Id.*

<sup>359</sup> 561 U.S. 742 (2010) (Breyer, J., dissenting)

<sup>360</sup> *Id.*

<sup>361</sup> *See supra*. Part IV.A.

<sup>362</sup> *Abigail Alliance*, 495 F.3d 695,722 (D.C. Cir. 2007)(en banc) (Rogers, J., dissenting)

<sup>363</sup> 6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. (1823)

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.<sup>364</sup>

Whether John Bingham, a principal author of the Fourteenth Amendment, consciously presumed during the drafting of the Amendment that the right to “obtain safety” was a “privilege and immunity” of citizens is beyond the scope of this discussion.<sup>365</sup> It nevertheless seems plain enough, historically speaking, that colonists, founders, and republicans would have recognized a right to a remedy for personal injury.<sup>366</sup> However, substantive due process runs deeper than history.

In *McDonald*,<sup>367</sup> the Supreme Court struck municipal handgun restrictions,<sup>368</sup> extending *Heller*'s<sup>369</sup> reach to the states.<sup>370</sup> Although not willing to broaden the cramped view of the Fourteenth Amendment's Privileges and Immunities Clause, established in the *Slaughterhouse* cases,<sup>371</sup> Justice Alito ultimately opined that the Fourteenth Amendment incorporated the Second Amendment's right to bear arms.<sup>372</sup> His opinion in many respects mirrors arguments made in the state courts and elsewhere regarding the historical grounding of tort law and the right to a remedy for physical injury.

The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms. See Calabresi & Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?* 87 *Texas L. Rev.* 7, 50 (2008). Quite a few of these state constitutional guarantees, moreover, explicitly protected the right to keep and bear arms as an individual right to self-defense. See Ala. Const., Art. I, § 28 (1868); Conn. Const., Art. I, § 17 (1818); Ky. Const., Art. XIII, § 25 (1850); Mich. Const., Art. XVIII, § 7 (1850); Miss. Const., Art. I, § 15 (1868); Mo. Const., Art. I, § 8 (1865); Tex. Const., Art. I, § 13 (1869); see also

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<sup>364</sup> *Id.* at 551

<sup>365</sup> See Jeffrey D. Jackson, *Be Careful What You Wish For: Why McDonald v. City of Chicago's Rejection of the Privileges or Immunities Clause May Not Be Such a Bad Thing For Rights*, 115 *PENN ST. L. REV.* 561, 589-90 (2011)

<sup>366</sup> Goldberg, *The Constitutional Status of Tort Law*, *supra.* n.32 at 545-568

<sup>367</sup> 561 U.S., *supra.*, at 749-750

<sup>368</sup> *Id.*

<sup>369</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008) (striking District of Columbia gun restrictions)

<sup>370</sup> *Id.*

<sup>371</sup> *McDonald*, *supra.*, at 758

<sup>372</sup> *Id.* at 791

Mont. Const., Art. III, § 13 (1889); Wash. Const., Art. I, § 24 (1889); Wyo. Const., Art. I, § 24 (1889); see also *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo.1986). What is more, state constitutions adopted during the Reconstruction era by former Confederate States included a right to keep and bear arms. See, e.g., Ark. Const., Art. I, § 5 (1868); Miss. Const., Art. I, § 15 (1868); Tex. Const., Art. I, § 13 (1869). A clear majority of the States in 1868, therefore, recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government. In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.<sup>373</sup>

In response to this familiar historical stratagem—attempting to establish that a right was recognized as fundamental at the time of the Founders and during the enactment of the Fourteenth Amendment and thus should be considered fundamental in present times—Justice Stevens replied,

More fundamentally, a rigid historical methodology is unfaithful to the Constitution's command. For if it were really the case that the Fourteenth Amendment's guarantee of liberty embraces only those rights "so rooted in our history, tradition, and practice as to require special protection," . . . , then the guarantee would serve little function, save to ratify those rights that state actors have *already* been according the most extensive protection. That approach is unfaithful to the expansive principle Americans laid down when they ratified the Fourteenth Amendment and to the level of generality they chose when they crafted its language; it promises an objectivity it cannot deliver and masks the value judgments that pervade any analysis of what customs, defined in what manner, are sufficiently " 'rooted' "; it countenances the most revolting injustices in the name of continuity, for we must never forget that not only slavery but also the subjugation of women and other rank forms of discrimination are part of our history; and it effaces this Court's distinctive role in saying what the law is, leaving the development and safekeeping of liberty to majoritarian political processes. It is judicial abdication in the guise of judicial modesty.<sup>374</sup>

This is where historical analyses often end. One side (it is unimportant which side) will say that an important right, though undeniably important, is not sufficiently valued within the text of the Constitution to warrant careful protection. The other side will retort that the right under discussion has been effectively protected against infringement by the states and "is implicit in the concept of ordered liberty."<sup>375</sup> As is the case in state law contexts already considered, in the absence of a Constitutional amendment or of the occasional change of perspective of a key Supreme Court Justice, there is little more to say once a mode of historical analysis has been decided upon.<sup>376</sup> In the context of the workers' compensation *quid pro quo*, it is unclear whether

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<sup>373</sup> *Id.* at 776

<sup>374</sup> *Id.* at 875-876

<sup>375</sup> *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937) *rev'd on other grounds* 395 U.S. 784, 794 (1969)

<sup>376</sup> See e.g. Justice Kennedy's opinion in *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003) (striking a Texas same-sex sodomy law and with respect to historical analysis stating, "[i]n all events we think that our laws and traditions in the past half century are of most relevance here.")

historical analysis was at the root of the Supreme Court's view that tort could not be supplanted without substitution of a reasonably just substitute. It is certainly possible that the Court may have found the tort right deserving of due process protection irrespective of its historical significance, though some work is required to accept such a conclusion.

D. *Structural Due Process, Lockean Provisos, and McDonald*

No just legal system could conclude that the right to a remedy for personal injury, and particularly for physical injury, is subject to significant modification or eradication on the whim of a legislature. Yet workers' compensation opt-out carries the potential for eradicating both an underlying tort right and the derivative workers' compensation right. In a similar vein, incremental erosion of workers' compensation rights continually creates the potential for inadequate remediation of injured workers. Following John Goldberg, this article contends that:

. . . it might be helpful to conceive of the right to a law of redress as one of a special set of due process rights that entitle individuals to certain governmental structures and certain bodies of law. If this notion of structural due process is sound, it will encompass more than just tort law, understood as a law for the redress of wrongs. Contract, criminal, family, and property law likewise seem plausible candidates for inclusion.<sup>377</sup>

As Goldberg has further argued, a structural due process theory can provide a framework for connecting areas of private and public law.<sup>378</sup> The argument for elevating the right to a remedy for personal injury is not a mechanical appeal to either natural law or to explicit constitutional text. It involves an assessment of what our legal *tradition* has *in fact* valued over the centuries. To say to the factory worker that the right to pursue a remedy for the loss of an arm may be dispensed with whenever a legislature believes a reasonable remedy would be too expensive is unacceptable on an almost primordial level. Indeed it raises questions as to whether individuals would in the original position assent to such a social arrangement. The idea of structural due process centers on intuitions about the nature of this original social arrangement. Goldberg suggests the structural due process right as potentially:

. . . Understood as an individual entitlement to certain political institutions, operating in accordance with certain norms or principles. The right to a vote that takes place under appropriate conditions, one might argue, is a guarantee of structure of the same sort as the right to a law for the redress of private wrongs, and the right to a government of separated powers.<sup>379</sup>

However, it must be said, respectfully, that this formulation unnecessarily dances around the primacy of the right to personal, physical security. People who have routinely been exposed to physical danger have no reason to question the importance of physical security. The importance of such a right can be vague only to those who are routinely secure.

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<sup>377</sup> Goldberg, *The Constitutional Status of Tort Law*, supra. n.32 at 625

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

It is evident that our legal tradition in fact values and protects such a right to personal security. One does not have to accept the view that only rights deeply-rooted in a formal historical sense count as “important” to acknowledge with implicit historical evidence what our legal system has in fact valued. Steven Calabresi and Sarah Agudo have found, for example, that in 1868 two-thirds of state constitutions had provisions guaranteeing unenumerated inalienable, natural, or inherent rights and have used the term “Lockean Natural Rights” to refer to those rights.<sup>380</sup> Justice Alito relied on Calabresi and Agudo’s work in *McDonald*,<sup>381</sup> and it is evident that the Court has now accepted the existence of unenumerated rights.<sup>382</sup> The Lockean characterization of these rights is traceable to George Mason’s authorship in the original draft of the Virginia Constitution’s Bill of Rights.<sup>383</sup> For purposes of this article, two of Mason’s early drafts of this language will suffice to illustrate the importance of security to the framers.

Record of Mason’s Lockean theory of government is first uncovered in a transcript of his *Remarks on Annual Elections for the Fairfax Independent Company* in 1775, a year before the 1776 adoption of the Virginia Declaration of Rights.<sup>384</sup> The main point of those remarks was that the Fairfax Independent Company should hold annual elections for its militia officers.<sup>385</sup> Mason elaborated considerably,

We came equals into this world, and equals shall we go out of it. All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required. Every society, all government, and every kind of civil compact therefore, is or ought to be, calculated for the general good and safety of the community. Every power, every authority vested in particular men is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these purposes, it may be called government, but it is in fact oppression.<sup>386</sup>

Then in 1776, Mason submitted his first draft of similar language for the Virginia “Lockean Rights” constitutional guarantee. The language states:

That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing [sic] and obtaining Happiness and Safety.<sup>387</sup>

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<sup>380</sup> Steven G. Calabresi and Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 1302

<sup>383</sup> *Id.* at 1314

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* citing George Mason, *Remarks on Annual Elections for the Fairfax Independent Company* (Apr.17-26, 1775), in 1 THE PAPERS OF GEORGE MASON, 1725-1792, at 229 (Robert A. Rutland ed., 1970) [hereinafter Papers]

<sup>387</sup> *Id.* at 1315

In each formulation the right to safety is mentioned. This seems unsurprising since in 1765 Blackstone discussed “personal security” as first among the “absolute rights” of the English law of that time.<sup>388</sup>

The purpose of this foray into history is not to say it should be “cited” because it is history but because it is correct. It is nearly impossible to suppose that any person would consciously enter into a society denying remedy for physical injury caused by wrongful conduct. While *McDonald* protects one aspect of personal security—physical self-defense through firearms<sup>389</sup>—it is much to be hoped that substantive due process might equally provide self-defense through utilization of those processes rendering resort to arms less necessary.<sup>390</sup> That seems the more fitting ideal of self-defense for a civilized society. At the end of the day many people will suffer injury in the workplace. It is true that a number of those injuries will be truly accidental and would not have been remedied under the law of negligence. Yet it is equally clear that many injuries will have resulted from the negligence of an employer. It is unacceptable and violative of structural due process that the American legal system could leave those injured employees without a reasonable remedy for injury. However, that is exactly what both opt-out and the continuous erosion of workers’ compensation benefits threaten.

## VI. CONCLUSION

It is evident that an opt-out movement seeks to persuade states to substantially immunize employers within their borders from legal liability for workplace injuries. Such a design would mark a decisive break with the *quid pro quo* Grand Bargain of the early twentieth century. Whether this movement will ultimately succeed depends in large part on the number of state judiciaries willing to interpret state constitutions as not providing a right to a remedy for personal injury. Many judiciaries are unlikely to allow such a dramatic encroachment on what has been understood in many states to be an important, if not fundamental, right. However, there is a risk of some states getting caught up in a “race to the bottom,” where states not recognizing a right to a remedy for physical injury become havens of low-cost labor and thus exert pressure on states that safeguard traditional rights to follow suit.

Throughout this article workers’ compensation has been discussed in tandem with tort remedies for personal, and especially physical, injuries. The discussion has in reality been a broader reflection on the limits of tort reform. Whether the particular context in such a conversation is products liability, medical malpractice, statutes of repose, or workers’ compensation the underlying issue is the limits of legislative discretion in reducing personal injury remedies. Opt-out is simply the most recent social consideration of who will bear losses occasioned by physical injury. However, opt-out crosses a line not often crossed in earlier tort reform debates. It is one thing to say that non-economic damages may be capped. It is quite another to say that the right to economic damages may be significantly circumscribed. To understand the radical nature of the project it must be constantly remembered that workers’ compensation already represents a

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<sup>388</sup> William Blackstone, Commentaries 1:120--41

<sup>389</sup> *McDonald v. City of Chicago*, *supra.*, 561 U.S. at 767.

<sup>390</sup> Alito’s conception of self-defense is essentially “pre-political.” We lay down our arms with the expectation that society will provide mechanisms of protection. At that point it is only when the state fails to protect us that resort to self-defense becomes morally justifiable. See Claire Finkelstein, *A Puzzle About Hobbes on Self-Defense*, 82 PAC. PHIL. Q. 332, 357 (2001).

significant compromise by workers of economic damages. A whole range of compensatory damages are simply not available as a result of the Grand Bargain. A century ago, workers had already completely surrendered non-economic damages. Many states struggle politically over the adequacy of benefits provided to injured workers. As in Florida, credible arguments can be made that inadequate benefits represent, as a practical matter, breach of the *quid pro quo*. Opt-out, without question, completely breaks the Bargain. Without a legal guarantee of some level of benefits for specified degrees of incapacity opt-out is not any kind of legal substitute for tort. The question *White* was able to defer is presented in the full light of day: "it perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it."<sup>391</sup> The Court may now be forced to intimate an opinion upon such abolishment and its jurisprudence may not be up to the task, though Lockean provisos be thrown by the wayside. If the Court does not intervene, one can anticipate renewed debates about the advisability of muscular federalization of workers' compensation as cost-shifts rumble through the economy. If workers' compensation does not pay the costs associated with injured workers something or someone else will. In that event, privatization of public law will have completed its march through the domain of employment law and into the very heart of structural due process.

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<sup>391</sup> *White*, 243 U.S. at 201, *supra*. n.28