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

Michael C. Duff*

Privatization of public law dispute resolution in workplaces has been under intense scrutiny in the context of arbitration. Another kind of workplace dispute privatization is presently underway, or under serious consideration, in several states. In connection with state workers' compensation statutes, one state has implemented, and others are considering, a dispute resolution model in which employers are explicitly authorized to "opt out" of coverage. "Alternative benefit plans," created under such statutes, permit employers to, among other things, unilaterally and without limitation designate private fact-finders, whose conclusions are subject to highly deferential judicial review. This model is arbitration on steroids. While there may be doubts in some quarters about the neutrality of arbitrators, reasonable doubts about the loyalties of an employer-appointed fact-finder are inevitable. Such a design would mark a decisive break with the quid pro quo/Grand Bargain of the early twentieth century, and 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.

*In response to this newest wave of innovation, the Supreme Court may be forced to intimate an opinion on the constitutional right to a remedy for personal, and especially physical, injury (whether within or outside of the workplace). The Court has not squarely addressed the issue since 1917, when it decided *New York Cent. R. Co. v. White*, a case originally upholding the constitutionality of workers' compensation systems. In *White*, the Court hinted, but did not clearly establish, that the right to a remedy for physical injury may not be abolished without substitution of a reasonable remedy.*

Workers' compensation opt out is in reality part of a larger discussion about "tort reform." This article discusses various theories of restraint of state legislatures implementing reforms in personal injury remedies. Ultimately the article concludes that the judiciary should apply heightened scrutiny when considering constitutional challenges to significant reforms of such remedies. No civilized society would subject significant legislative reductions to remedies for personal injury to merely cursory judicial review.

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I. INTRODUCTION

Privatization¹ of public law dispute resolution in workplaces has been under intense scrutiny in recent years, most frequently in the context of arbitration.² Whether one agrees or disagrees with compulsory arbitration of workplace claims, its existence is no longer remarkable.³ 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 startling⁴ 2012 opinion in *Marmet Health Care Center v. Brown*,⁵ in which the Court announced, in a *per curiam* opinion, that personal injury and wrongful death suits are covered by the Federal Arbitration Act,⁶ suggests that the scope of arbitration will likely expand.⁷ As important as the policies and values inherent in employment law may be, the law of personal injury is older, even ancient.⁸ Tort values are difficult to square with notions of arbitration contracts or of the waiver of rights in employment or commercial contexts.⁹ 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.

¹ U.S. EEOC, NOTICE NO. 915.002 (July 10, 1997), <http://www.eeoc.gov/policy/docs/mandarb.html> (“1. SUBJECT: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.”) (arguing that compulsory arbitration privatizes governmental anti-discrimination enforcement).

² See, e.g., Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=1.

³ See generally IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 7-9 (2013).

⁴ 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 ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 292 (W. Va. 2011), *vacated sub nom. Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012) (*per curiam*).

⁵ 132 S. Ct. 1201 (2012).

⁶ *Id.* 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 arguable within the agreement's ambit. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25-26 (1991).

⁷ *Marmet Health*, 132 S. Ct. 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 has taken a formal position against the type of pre-injury waivers of wrongful death claims that were at issue in *Marmet*. See ABA Comm'n on Law and Aging, Rep. 111B (2009) (adopted by the House of Delegates Feb. 16, 2009), http://www.americanbar.org/content/dam/aba/directories/policy/2009_my_111b.authcheckdam.pdf.

⁸ 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.

⁹ Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 Law & Contemp. Probs. 253, 273 (2004) (“At the extreme, unrestrained enforcement of arbitration clauses could make all tort policy considerations disappear altogether”).

The American Arbitration Association has frequently declined to conduct arbitrations based on pre-injury agreements to arbitrate medical malpractice cases.¹⁰ Even during the peak of industrialism, not far removed in time from *Lochner*, some late nineteenth 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.¹¹

Another kind of workplace dispute privatization is presently underway in several states.¹² In connection with century-old workers' compensation laws—the successors to tort laws and especially to the law of negligence¹³—one state has implemented,¹⁴ and others are considering,¹⁵ 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,¹⁶ permit employers to, among other things, designate private workers' compensation fact finders,¹⁷ whose findings of fact are subjected to highly deferential judicial review.¹⁸ This model is arbitration on steroids. While there may be doubts in some quarters about the neutrality of arbitrators,¹⁹ reasonable doubts about the loyalties of an employer-appointed fact-finder are inevitable.²⁰

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

¹⁰ *Crossman v. Life Care Ctrs. of Am.*, 738 S.E.2d 737, 739 (N.C. Ct. App. 2013); *Dean v. Heritage Healthcare of Ridgeway*, 759 S.E.2d 727, 730 (S.C. 2014).

¹¹ *Johnson v. Philadelphia & R.R. Co.*, 29 A.854 (Pa. 1894).

¹² See *infra* Part III.

¹³ See *infra* Part II.

¹⁴ See *infra* Part III. B.

¹⁵ Michael Grabbell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp*, PROPUBLICA, Oct. 14, 2015, <https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp> [hereinafter Grabbell & Berkes].

¹⁶ TEX. LAB. CODE. ANN. § 406.002 (West 2015); OKLA. STAT. ANN. tit. 85A §§ 3, 202 (West 2015).

¹⁷ See 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.

OKLA. STAT. ANN. tit. 85A § 211(B)(1) (West 2015). Thus, the employer may appoint as fact finder *any* three individuals who “were not involved in the original adverse benefit determination.”

¹⁸ See *infra* Part III. B.

¹⁹ See generally Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 12 (2011).

²⁰ “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).

²¹ See *infra* Part III. A.

²² Although dated, figures from 2001 showed that only about seven percent of opt-out employers required their employees to sign waivers. Joseph Shields & John Schnautz, *Litigation Trends and the Use of Liability Waivers by Nonsubscribing Employers*, 6:4 TEXAS MONITOR (Winter 2001) (RESEARCH & OVERSIGHT COUNCIL ON WORKERS' COMP., TEX. DEP'T INS.), available at <http://www.tdi.texas.gov/pubs/wcreg/mon6-4waiver.html>.

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."²³ In states that retain the exclusive remedy rule and that allow 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.²⁴ However, workers' compensation opt-out potentially leaves employees even more vulnerable,²⁵ because of the possible scope and magnitude of injury claims,²⁶ and because of employers' legally-conferred discretion to choose dispute fact finders.²⁷

This article discusses both opt-out and a type of incremental erosion of workers' compensation benefits transpiring in some states.²⁸ More broadly, this article concerns "tort reform." At times, this 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.²⁹ Thus, while this article is about the somewhat novel workers' compensation opt-out phenomenon, it is 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 such as "tort reform,"³⁰ "medical malpractice reform,"³¹ and the application of state statutes of repose to bar tort claims.³² In short, the question of the limits of state interference with tort remedies comes up whenever legislatures attempt to decrease plaintiff tort compensation.³³ Virtually the same questions are implicated by workers' compensation reform because workers' compensation rights have been, from their inception, explicitly derived from tort rights.³⁴ Workers' compensation claimants stand in the historical shoes of torts plaintiffs.³⁵ Generally speaking, opt-out implicates the complete elimination of a right to a

²³ MICHAEL C. DUFF, *WORKERS' COMPENSATION LAW* 326 (2013).

²⁴ As a practical matter, there is almost no substantive judicial review of an arbitration award. 9 U.S.C.S. §§ 9-11 (2008).

²⁵ For an excellent introduction to opt-out, see Grabell & Berkes, *supra* note 15.

²⁶ 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 LAB. STAT., U.S. DEP'T OF LAB., *Employer-Reported Workplace Injuries and Illnesses—2014* (Oct. 29, 2015), <http://www.bls.gov/news.release/pdf/osh.pdf>.

²⁷ See *supra* notes 17-18 and accompanying text. In Texas and Oklahoma employers are able to combine opt-out with arbitration. See *infra* Parts III. A., III. B.

²⁸ See *infra* Part III.

²⁹ See, e.g., *infra* Part IV. A.

³⁰ *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).

³¹ *Carson v. Maurer*, 424 A.2d 825, 829 (N.H. 1980) (striking several provisions modifying tort law as applied to medical malpractice); see *infra* Part IV. C.

³² *Hanson v. Williams County*, 389 N.W.2d 319, 319-20 (N.D. 1986).

³³ 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 (2005).

³⁴ Jean C. Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CAL. L. REV. 857, 857 (1985).

³⁵ Tort reform has come in waves.

remedy for workplace injury,³⁶ while the incremental erosion of rights concerns the adequacy of benefits.³⁷ Debates over tort reform often involve tort caps, especially caps of noneconomic damages,³⁸ which is a question of adequacy. Workers' compensation benefits do not allow for the possibility of noneconomic benefits,³⁹ and while 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, in essence, that is what opt-out permits.⁴⁰

This Article is divided into five parts. 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; Subparts A and B address Texas and Oklahoma, presently the only states with enacted opt-out statutes,⁴¹ thereby representing the most dramatic break to date with the historical workers' compensation mode. Subpart C examines Florida, a state that has allegedly incrementally eroded its workers' compensation benefits to the point where the benefits are unreasonable or inadequate.⁴² Part IV of this Article discusses the prospect of restraining state "tort reform" through "right to remedy,"⁴³ "open courts,"⁴⁴ or "*quid pro quo*"⁴⁵ provisions in state constitutions. Part V concludes by discussing 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*,⁴⁶ a case originally upholding the constitutionality of the American workers' compensation model.⁴⁷ 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

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 & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1029-32 (2005).

³⁶ Texas, as will be seen is the exception. *See infra* Part III. A. 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.

³⁷ *See infra* Part III. C.

³⁸ *See infra* note 406 and accompanying text.

³⁹ *See supra* note 23 and accompanying text.

⁴⁰ 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* Parts III. A., III. B.

⁴¹ *See infra* Parts III. A., III. B.

⁴² *See, e.g., Stahl v. Hialeah Hospital*, 160 So.3d 519 (Fla. Dist. Ct. App. 2015), *rev granted*, 2015 WL 6126944 (challenging as unconstitutional requirement that injured workers contribute to medical expense occasioned by work-related injury).

⁴³ *See infra* Part IV. A.

⁴⁴ *See infra* Part IV. A.

⁴⁵ *See infra* Part IV. B.

⁴⁶ 243 U.S. 188, 207-09 (1917); *accord* *Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 162-63 (1919).

⁴⁷ *White*, 243 U.S. at 209.

modalities, principles of “structural due process” and “Lockean provisos” compel a conclusion that our legal order should find repugnant inadequate remedies for negligently-caused physical injury or for accidental injury comprehended within the historical workers’ compensation “grand bargain.”⁴⁸

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.⁴⁹ This 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.⁵⁰ These were 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.⁵¹ Bismarck’s views were admittedly offered in the service of Christendom and born of a fierce opposition to socialism and communism;⁵² nevertheless, they were not what a contemporary person might expect from the chancellor of “blood and iron.”⁵³ The ideal of workers’ compensation caught on across the then-industrializing late nineteenth century world, and had spread to the United States by 1910.⁵⁴ The rudimentary concept was that negligence lawsuits would be “exchanged” for statutorily pre-determined benefits.⁵⁵ Workers with viable negligence claims would probably receive less compensation under a workers’ compensation statute than they might have in tort.⁵⁶ But, on average, many more workers were likely to receive *some* compensation for work-related injuries under workers’ compensation statutes than in negligence suits.⁵⁷ In negligence, workers were frequently defeated by affirmative defenses and ultimately received no compensation⁵⁸—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 that the

⁴⁸ See *infra* Part V. A.

⁴⁹ Peay v. U.S. Silica Co., 437 S.E.2d 64, 65 (1993).

⁵⁰ STEPHEN TALTY, EMPIRE OF BLUE WATER: CAPTAIN MORGAN’S GREAT PIRATE ARMY, THE EPIC BATTLE FOR THE AMERICAS, AND THE CATASTROPHE THAT ENDED THE OUTLAW’S BLOODY REIGN 58-59 (2007); N.Y. STATE WORKERS’ COMP. BD., CENTENNIAL 7 (2014) (citing ALEXANDER O. EXQUEMELIN, THE BUCCANEERS OF AMERICA (1678) (translated by Alexis Brown)), http://www.wcb.ny.gov/WCB_Centennial_Booklet.pdf.

⁵¹ Otto von Bismarck, *Practical Christianity*, in 20 THE GERMAN CLASSICS 221, 228 (1914), <http://www.unz.org/Pub/FranckeKuno-1913v10-00221>.

⁵² A.J.P. Taylor, Bismarck: The Man and the Statesman 57 (1967).

⁵³ *Id.*

⁵⁴ Commentators typically reference the year 1910 as the beginning of the workers’ compensation reception period, though it is difficult to fix the date with precision. See generally PRICE V. FISHBACK & SHAWN EVERETT KANTOR, *The Adoption of Workers’ Compensation in the United States, 1900-1930*, 41 J.L. & Econ. 305, 305-06 (1998) [hereinafter Fishback & Kantor].

⁵⁵ Fishback & Kantor, *supra* note 54 at 305-06..

⁵⁶ PRICE V. FISHBACK & SHAWN E. KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS’ COMPENSATION 4 (2000) [hereinafter FISHBACK & KANTOR, A PRELUDE].

⁵⁷ *Id.*

⁵⁸ Affirmative defenses that became known as the “unholy trinity”: assumption of the risk, contributory negligence, and the fellow servant rule. See DUFF, *supra* note 23, at 371.

substitution was not “repugnant to the provisions of the Fourteenth Amendment.”⁵⁹ 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 reasonably just substitute.”⁶⁰ 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.⁶¹ The Court also recognized that the system would be operated by a public, state administrative commission.⁶² These features, therefore, were implicitly deemed to be a reasonable substitute for a tort suit.

At the present moment in history, 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.⁶³ 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 could continue to be available and “reasonable.”⁶⁴

This *quid pro quo* 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.⁶⁵ Oklahoma has already done so.⁶⁶ 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.⁶⁷ Oklahoma’s abrupt embarkation on the opt-out route instantly generated litigation.⁶⁸ On the other hand, over time, Florida has made significant but incremental reductions to its workers’ compensation benefits, provoking periodic litigation resistance.⁶⁹ The Florida model of incremental erosion is not unique. *The Demolition of Workers’ Comp*,⁷⁰ a recent and much-discussed article produced jointly by ProPublica and National Public Radio, contends that, “[o]ver the past decade, state after state has been dismantling America’s workers’ comp system

⁵⁹ *White*, 243 U.S. at 208. The logical corollary, of course, is that such a substitution could be repugnant.

⁶⁰ *Id.* at 201. 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 is not clear.

⁶¹ *Id.* at 193.

⁶² *Id.* at 194.

⁶³ *Munn v. Illinois*, 94 U.S. 113, 144 (1876) (Field, J., dissenting).

⁶⁴ See generally *Smothers v. Gresham Transfer*, 23 P.3d 333, 356 (Or. 2001); see *infra* Part IV.

⁶⁵ See Grabell & Berkes, *supra* note 15; see also *supra* note 16.

⁶⁶ See *infra* Part III. B.

⁶⁷ Emily A. Spieler & John F. Burton Jr., *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers’ Compensation Benefits*, 55 AM. J. INDUS. MED. 487, 498-502 (2012) (discussing benefit reductions and other obstacles to employee pursuit of legitimate workers’ compensation claims).

⁶⁸ See *infra* Part III. B.; see generally *Coates v. Fallin*, 316 P.3d 924 (Okla. 2013).

⁶⁹ See *infra* Part III. C.; see generally *Padgett v. State*, No. 11-13661 CA 25, 2014 WL 6685226, at ¶ 7 (Fla. Cir. Ct. Aug. 13, 2014) (dismissed on procedural grounds).

⁷⁰ Michael Grabell & Howard Berkes, *The Demolition of Workers’ Comp*, PROPUBLICA (Mar. 4, 2015), <https://www.propublica.org/article/the-demolition-of-workers-compensation> [hereinafter Grabell & Berkes, *Demolition*].

with disastrous consequences for many of the hundreds of thousands of people who suffer serious injuries at work each year.”⁷¹

On the contemporary opt-out front, the popular press has reported that a corporate-funded lobbying group, the Association for Responsible Alternatives to Workers’ Compensation (“ARAWC”), stated that “the corporations ultimately want to change workers’ comp laws in all 50 states.”⁷² On its website, the ARAWC discusses Tennessee as a state in which opt-out is actively under construction.⁷³ An “Employee Injury Benefit Alternative” was introduced in the Tennessee Senate in 2015 but did not pass.⁷⁴ A second attempt was made in the spring of 2016, but the bill failed, possibly due to an ethics controversy surrounding the bill’s sponsor.⁷⁵ ARAWC’s materials suggest that it has national ambitions,⁷⁶ and South Carolina appears to be the group’s next target of opportunity.⁷⁷

⁷¹ *Id.*

⁷² Molly Redden, *Walmart, Lowe’s, Safeway, and Nordstrom Are Bankrolling a Nationwide Campaign to Gut Workers’ Comp*, MOTHER JONES (Mar. 26, 2015, 10:47 AM), <http://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation> (citing Stephanie K. Jones, *Group Aims to Create Alternatives to Workers’ Comp State-by-State*, *Ins. Journal*, Nov. 10, 2014, <http://www.insurancejournal.com/news/national/2014/11/10/346291.htm>); *see also* Grabell & Berkes, *supra* note 15.

⁷³ *See Tennessee Option*, ASS’N FOR RESPONSIBLE ALT. TO WORKERS’ COMP., <http://arawc.org/state-priorities/tennessee/> (last visited May 25, 2016).

⁷⁴ *See* S. B. 721, 190th Gen. Assemb., Reg. Sess. (Tenn. 2015). It is anticipated that the bill will be reintroduced with revisions in 2016. Amy O’Connor *Tennessee Workers Comp Opt-Out Legislation Revised, Ready for Next Session*, *INS. JOURNAL*, June 1, 2015, <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.

[I]t 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.

David B. Torrey, Appendix B: Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers’ Compensation System, Mar. 9, 2015, in *The Opt-Out of Workers’ Compensation Legislation in the Southern States*, Keynote Speaker at MCLE New England: 16th Annual Workers’ Comp. Conference 2015 (Nov. 20, 2015), http://www.davetorrey.info/files/Torrey.MCLE_Mass_Opt-out.10.26.15final.pdf.

⁷⁵ *See* Stephanie Goldberg, *Did texting scandal derail Tennessee workers comp opt-out effort?*, *BUS. INS.* (Feb. 4, 2016), <http://businessinsurance.com/article//20160204/NEWS08/160209901/did-texting-scandal-derail-tennessee-workers-comp-opt-out-effort?tags=%7C92%7C329%7C304>.

⁷⁶ From the ARAWC’s website:

The Association for Responsible Alternatives to Workers’ Compensation (ARAWC) is a national organization comprised of employers, workers’ compensation system providers, and industry experts dedicated to enacting state workers’ compensation alternatives (an Option) that deliver better outcomes to employees, while giving employers a choice in how they manage their injury benefits programs.

ARAWC, *About Us*, <http://arawc.org/about/> (last visited May 5, 2016).

⁷⁷ Amy O’Connor, *South Carolina Jumps Aboard Workers’ Comp Alternative Bandwagon*, *INS. JOURNAL* (June 10, 2015), <http://www.insurancejournal.com/news/southeast/2015/06/10/371088.htm>.

Observers of workers' compensation reform acknowledge that its overall purpose is to save businesses money.⁷⁸ The essential issue then, is the legal limit of business subsidization by the states. A business environment without rules—without workers' compensation or tort—is clearly 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.⁷⁹ The question is whether there are any constitutional limitations on that subsidization and, therefore, any principled 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.⁸⁰ 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 a minimum, rational.⁸¹

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

A. Texas

Texas is unique among the states,⁸² with a workers' compensation system that has allowed employers to opt out of the system entirely since its conception in the early twentieth century.⁸³ More precisely, while several other states initially enacted elective statutes (like the one in Texas), they all subsequently switched to compulsory systems.⁸⁴ Employers in Texas,

⁷⁸ *Workers' Compensation Opt-Out: Can Privatization Work?*, NEW STREET GROUP (Nov. 2012), <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.* at 6.

⁷⁹ With respect to the elimination of permanent incapacity benefits, *see infra* note 176 and accompanying text. In 2013, the direct costs of workers' compensation injuries were roughly \$60 billion. *See 2016 Liberty Mutual Workplace Safety Index*, LIBERTY MUT. RESEARCH INST. FOR SAFETY, <https://www.libertymutualgroup.com/about-liberty-mutual-site/research-institute-site/Documents/2016%20WSI.pdf> (last visited May 26, 2016).

⁸⁰ *See White*, *supra*, note 46 and accompanying text.

⁸¹ *Cf. Goldberg*, *supra* note 33, 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.”).

⁸² *See Meagan Flynn*, *Don't Fall Down on the Job in Texas: Employers Don't Have to Provide Injury Coverage*, HOUSTON PRESS (Feb. 2, 2016, 5:00 AM), <http://www.houstonpress.com/news/don-t-fall-down-on-the-job-in-texas-employers-don-t-have-to-provide-injury-coverage-8120319>. Texas is not the only current opt-out state. Oklahoma, soon to be discussed, is the second such state. It may technically be 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 to not comply with the “traditional” law: opt-out and arbitration. *See infra* Part III. B.

⁸³ 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* Part III. A.

⁸⁴ 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.

including large employers, routinely opt-out.⁸⁵ What makes Texas paradigmatic is not its “new” approach but its perennial status as a deregulatory model.⁸⁶ 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’ benefits, legal rights and health care choices. Only 41 percent of the plans include death benefits, for example, according to state surveys.⁸⁷

Texas has been at or near the top of national workplace death rates in recent years,⁸⁸ and explanations abound as to why this is so.⁸⁹ 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 scale⁹⁰—was that the company running the plant was a “nonsubscriber,” an opt-out employer.⁹¹ Although none of the plant’s workers were injured or killed in the blast,⁹² 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 one million dollars.⁹³ Damages resulting from the accident were estimated at 100 million dollars.⁹⁴ Under-deterrence and under-insurance were, in other words, a pervasive feature of the plant’s operations, and opt-out was intertwined with this unsafe profile.⁹⁵

Supreme Court would strike down compulsory workers’ compensation systems on due process grounds. *See* FISHBACK & KANTOR, A PRELUDE, *supra* note 56, at 93, 104.

⁸⁵ 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, *supra* note 78, at 27.

⁸⁶ Jason Ohana, *Texas Elective Workers’ Compensation: A Model of Innovation?*, 2 WM. & MARY BUS. L. REV. 323, 339 (2011).

⁸⁷ Jay Root, *Hurting for Work*, TEXAS TRIBUNE (June 29, 2014), <http://apps.texastribune.org/hurting-for-work/>.

⁸⁸ *See* Bill Bowen, *As Workplace Deaths Fall Nationally, They Remain Stubbornly High in Texas*, DALLAS MORNING NEWS (Sept. 15, 2012), <http://www.dallasnews.com/business/headlines/20120915-as-workplace-deaths-fall-nationally-they-remain-stubbornly-high-in-texas.ece>.

⁸⁹ *See, e.g.*, James Gordon, *Death on the Job: Texas Workers More Likely to Die Than Counterparts Elsewhere*, DALLAS MORNING NEWS (Aug. 16, 2014), http://res.dallasnews.com/interactives/2014_workplace/.

⁹⁰ Ian Urbina et al., *After Plant Explosion, Texas Remains Wary of Regulation*, N.Y. TIMES (May 9, 2013), <http://www.nytimes.com/2013/05/10/us/after-plant-explosion-texas-remains-wary-of-regulation.html?partner=rss&emc=rss&pagewanted=all>.

⁹¹ Arthur D. Postal, *West Fertilizer Blast Spotlights Texas Workers Comp System, Okla. Legislation*, Property Casualty 360° (Apr. 24, 2013), <http://www.propertycasualty360.com/2013/04/24/west-fertilizer-blast-spotlight-texas-workers-com>.

⁹² The explosion killed fifteen non-employees and injured two hundred others. Doug J. Swanson & Reese Dunklin, *West Fertilizer Co. Was Insured For Only \$1 Million, A Fraction of The Estimated Losses*, DALLAS MORNING NEWS (May 3, 2013, 11:03 PM), <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>.

⁹³ *Id.*

⁹⁴ 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. *Id.*

⁹⁵ 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 to *either* develop an alternative plan regulated by ERISA, or to “go bare” in hard economic times, the incentive for underinsurance seems high.

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.⁹⁶ 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 all⁹⁷—may effectively require their employees to waive a tort suit and participate in arbitration as a condition of employment.⁹⁸ While pre-injury waivers of the right to sue are forbidden under Texas law,⁹⁹ the Texas courts have held that the state may not prohibit the waivers then accompanied by a promise to arbitrate as a result of preemption by the Federal Arbitration Act.¹⁰⁰ 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.¹⁰¹

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 its opt-out status and that it inform employees at the time of hire of the status.¹⁰² An employer must also conspicuously post notices of its opt-out status in the workplace.¹⁰³ In 2014, 33 percent of Texas employers opted out of the workers’ compensation system.¹⁰⁴ An estimated 20 percent of Texas private-sector employees (representing approximately 1.9 million employees in 2014) worked for non-subscribing employers.¹⁰⁵ In 2014, two-thirds of non-subscribing employers, representing about 22 percent of Texas employers overall, provided no alternative benefit plan.¹⁰⁶ However, because Texas opt-out employers providing alternative benefit plans tend to be large, they employ 75 percent of the opt-out employee population.¹⁰⁷ Thus, in Texas, 25 percent of the 1.9 million opt-out employees—475,000 employees—are not covered 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’

⁹⁶ See Sheena Harrison, *Texas Employers Still Opting Out Despite Lawsuits*, BUSINESS INSURANCE (Jan. 17, 2016, 12:01 AM), <http://www.businessinsurance.com/article/20160117/NEWS08/301179995/texas-employers-still-opting-out-of-states-workers-compensation>.

⁹⁷ See TEX. LAB. CODE ANN. § 406.002(a) (West 2015).

⁹⁸ See Harrison, *supra* note 96.

⁹⁹ TEX. LAB. CODE ANN. § 406.033(e) (West 2015).

¹⁰⁰ 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 lawsuit. 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, 2942-43 (2015).

¹⁰¹ Ohana, *supra* note 86, at 355.

¹⁰² TEX. LAB. CODE ANN. § 406.005 (West 2015).

¹⁰³ TEX. LAB. CODE ANN. § 406.005 (West 2015).

¹⁰⁴ TEX. DEP’T OF INS., SETTING THE STANDARD: AN ANALYSIS OF THE IMPACT OF THE 2005 LEGISLATIVE REFORMS ON THE TEXAS WORKERS’ COMPENSATION SYSTEM, 2014 RESULTS, at 118 (Dec. 2014), <http://www.tdi.texas.gov/reports/dwc/documents/2014regbiennialrpt.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

compensation benefits that would otherwise be required by law.¹⁰⁸ In the words of former Chief Justice Hardberger of the Texas Fourth Court of Appeals:

A non-subscribing 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.¹⁰⁹

Under the Texas system of workers' compensation arbitration, figures show that employers require their employees to sign an arbitration agreement for personal injury before an injury has occurred, and 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.¹¹⁰

Based on 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,¹¹¹ it is difficult to contend that a societal grand bargain was breached. Both employers and employees have been able to opt out of (or not opt in to) Texas workers' compensation from its inception.¹¹² To the extent that employees are denied the opportunity of a reasonable remedy for workplace injury, the question of whether the

¹⁰⁸ Phil Hardberger, C.J., *Texas Workers' Compensation: A Ten Year Survey – Strengths, Weaknesses, and Recommendations*, 32 ST. MARY'S L.J. 1, 7 (2000).

¹⁰⁹ *Id.* See also Ohana, *Texas Elective Workers' Compensation*, *supra* note 86, at 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 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.

¹¹⁰ Ohana, *supra* note 86, at 343-44. As of 2014, it appeared that seventy-nine percent of non-subscribers using arbitration (14 percent in 2014) required their employees to sign an arbitration agreement as a condition of hire. Approximately sixty-six percent of large non-subscriber employers use arbitration. See EMPLOYER PARTICIPATION IN THE TEXAS WORKERS' COMPENSATION SYSTEM: 2014 ESTIMATES, at 38, TEXAS DEP'T OF INSURANCE, WORKERS' COMPENSATION RESEARCH AND EVALUATION GROUP (2014), available at <http://www.tdi.texas.gov/reports/wcreg/documents/nonsub.pdf>. Curiously, tracking of employers with ongoing relationships with arbitrators has not been undertaken in the 2014 Texas Report the 2008 version of which formed the corpus of Ohana's findings, see Ohana, *supra* note 86, at 344.

¹¹¹ Ohana, *supra* note 86, at 339.

¹¹² *Id.*

Texas system is constitutionally adequate remains open. On the one hand, negligence suits remain available to employees of opt-out employers. However, this raises the specter of the cumbersome and expensive tort system, replete with the same affirmative defenses that spurred the creation of workers' compensation. At the same time, operation of compulsory arbitration makes it extremely uncertain that an injured worker will make it to trial.

B. Oklahoma

Oklahoma is the most recent state to adopt a workers' compensation system that authorizes opt-out.¹¹³ Unlike Texas, Oklahoma requires employers either to formally participate in the state's traditional workers' compensation system—by obtaining insurance or becoming self-insured—or to submit for state approval an alternative benefit plan.¹¹⁴ Thus, employers in Oklahoma may not “go bare.”¹¹⁵

Oklahoma employees, compelled to participate in alternative benefit plans, continue to be bound by the exclusive remedy rule.¹¹⁶ Therefore, unlike the situation in Texas, Oklahoma employees participating in an alternative benefit plan (who are therefore not entitled to workers' compensation benefits) are also not entitled to bring tort suits.¹¹⁷ 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.¹¹⁸ Generally, just as in Texas, workers' compensation benefits may not lawfully be waived under the Oklahoma Act.¹¹⁹ However, and also as is the case in Texas,¹²⁰ employers may enter into agreements with employees waiving workers' compensation benefits in lieu of arbitration.¹²¹ And, such agreements are probably enforceable under the Federal Arbitration Act.¹²²

Some background is required to grasp these developments. In 2013, the Oklahoma legislature abrogated the former Workers' Compensation Code¹²³ and replaced it with three interrelated statutes: the Administrative Workers' Compensation Act,¹²⁴ the Oklahoma Employee

¹¹³ See, e.g., *Pilkington v. Doak*, No. PR-113662, 3 (Okla. 2015) (review denied).

¹¹⁴ OKLA. STAT. ANN. tit. 60-85A, §§ 3, 202 (West 2015).

¹¹⁵ They may, however, enter into agreements with employees to arbitrate workers' compensation claims under a discrete section of the Workers' Compensation Act called, “The Workers' Compensation Arbitration Act.” OKLA. STAT. ANN. tit. 60-85A, § 300 (West 2015).

¹¹⁶ OKLA. STAT. ANN. tit. 60-85A, § 209(A) (West 2015).

¹¹⁷ *Id.*

¹¹⁸ 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. As a practical matter, this amounts 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.”

¹¹⁹ OKLA. STAT. ANN. tit. 60-85A, § 8 (West 2015).

¹²⁰ OKLA. STAT. ANN. tit. 60-85A, § 301 (West 2015).

¹²¹ OKLA. STAT. ANN. tit. 60-85A, § 304 (West 2015).

¹²² The U.S. Supreme Court has not directly ruled on the question. See, e.g., *Morales v. Odyssey Healthcare, Inc.*, 131 S. Ct. 319 (2010) (cert. denied). See Brief for Guadalupe Morales as Amici Curiae Supporting Petitioner at 22, *In re Morales*, 2010 WL 2912538 (2010) (No. 10-134) (arguing among other things that the 10th Amendment prevents Congress from legislating in traditional state areas).

¹²³ OKLA. STAT. ANN. tit. 85A (2015).

¹²⁴ *Id.* at § 1.

Injury Benefit Act,¹²⁵ and the Workers' Compensation Arbitration Act.¹²⁶ The second of these statutes, the Employee Injury Benefit Act, would allow "certain employers to adopt and administer benefit plans consistent with the Administrative Act, and the Workers' Arbitration Compensation Act."¹²⁷ However, appeals of benefit determinations under the Oklahoma Employee Injury Benefit Act are made to a private employer's internal adjudication committee rather than to a state or other public official.¹²⁸ Following internal review of the committee decision, an aggrieved employee may appeal to the state Workers' Compensation Commission.

This statutory requirement assumes that any occupational injury plan not covered by the workers' compensation statute—that is, an alternative benefit plan—is covered by ERISA. However, this remains an open question.¹²⁹ The Employee Injury Benefit Act also requires that the Commission "rely on the record established by the internal appeal process and use an objective standard of review that is not arbitrary or capricious."¹³⁰ The ability of an employer to opt out is liberally authorized. The employer is required only to provide notice to state officials and employees,¹³¹ develop a written benefit plan,¹³² post a bond of \$1,500,¹³³ and provide

¹²⁵ *Id.* at § 200.

¹²⁶ *Id.* at § 300.

¹²⁷ *Coates v. Fallin*, 316 P.3d 924, 924 (Okla. 2013).

¹²⁸ Okla. Stat. Ann. tit. 85A, § 211(B)(1-4) (2015). At least one justice of the Oklahoma Supreme Court would find this provision unconstitutional on its face. *Coates*, 316 P.3d at 929 (Reif, J., dissenting in part).

¹²⁹ ERISA provides:

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. . . .

ERISA, 29 U.S.C. § 1002(1) (2006). The Act 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 or disability insurance laws." *Id.* § 1003(b)(3).

ERISA states:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter 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.

Id. § 1144(a). However, ERISA exempts in relevant parts any employee benefit plan "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." *Id.* § 1003(b)(3). The underlying logical assumption is that creating 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 Oklahoma Employee Injury Benefit Act is achieved, and it is arguable whether that statute is a "workmen's compensation law."

¹³⁰ OKLA. STAT. ANN. tit. 85A, § 211, B., 6 (2015). 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 id.* § 78(A).

¹³¹ The Oklahoma Employee Injury Benefit Act provides that the employer's notice must be provided to employees at the time of hire, and such employers shall notify employees "that it does not carry workers' compensation insurance coverage and that such coverage has terminated or been cancelled." *Id.* at § 202(H), (I).

¹³² *Id.* § 202(A)(2).

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 (3) years.”¹³⁴ In short, it is meant to be—and is—very easy for an employer to opt out of workers’ compensation by adopting an alternative benefit plan in Oklahoma.¹³⁵

Procedural innovations, such as those discussed above, 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.¹³⁶ The procedural due process implications in the design of employer-dominated “committees,”¹³⁷ coupled with limited judicial review are plain enough, but are beyond the scope of this discussion.¹³⁸ One is inclined to agree with Oklahoma Supreme Court Justice Combs in *Coates v. Fallin*,¹³⁹ the first state Supreme Court case challenging the constitutionality of the Employee Injury Benefit Act.¹⁴⁰ A number of “disparate treatment” issues under this unilateral employer system will emerge but must await future judicial analysis.¹⁴¹ Nevertheless, facial *quid pro quo* challenges, alleging both inadequate procedure and substance, appear unavoidable and have already begun.¹⁴² 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.¹⁴³

¹³³ *Id.* § 202(B).

¹³⁴ OKLA. STAT. ANN. tit. 85A, § 204(B)(2)(a)(1) (2015).

¹³⁵ However, as has been mentioned, it is even easier for an employer to opt-out of the system in Texas as of this writing. TEX. LAB. CODE ANN. § 406.002(a) (West 2013).

¹³⁶ *Kuney v. PMA Ins. Co.*, 578 A.2d 1285, 1287 (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 quotations omitted) (citation omitted).

¹³⁷ Both Oklahoma and federal courts have insisted that a fundamental element of due process is a fair and impartial trial. *Clark v. Bd. of Educ. Of Indiana School Dist. No. 89*, 32 P.3d 851, 854 (Okla. 2001). This includes a 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.’”) (citation omitted).

¹³⁸ In a recent successful administrative challenge to the Injury Benefit Act, procedural due process arguments did not factor into the Workers’ Compensation Commission’s conclusion that the statute was unconstitutional. *Vasquez v. Dillard’s, Inc.*, CM-2014-11060L (Okla. Workers’ Comp. Comm’n) (Feb. 26, 2016); see also Michael C. Duff, *Workers’ Comp Agency Declares Oklahoma Opt-Out Statute Unconstitutional*, LEXISNEXIS NEWSROOM: WORKERS COMP. LAW (Feb. 28, 2016, 11:31 PM).

¹³⁹ 316 P.3d 924 (Okla. 2013).

¹⁴⁰ See *id.* at 924-25 (deciding constitutional issues as matters of first impression).

¹⁴¹

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.

Id. at 925 (Combs, J., concurring).

¹⁴² A leading Oklahoma practitioner informs the author that multiple cases in Oklahoma are pending that charge legislative violations of the “grand bargain”/*quid pro quo*. See McAnany, Van Cleave & Philips, P.A., Oklahoma Workers’ Compensation 17, 19, 20, 21 (2015),

[http://www.mvplaw.com/post/articles/Oklahoma%20Materials\(1\).pdf](http://www.mvplaw.com/post/articles/Oklahoma%20Materials(1).pdf) (listing *Duck v. Morgan Tie*, No. 113,601 (Okla.), *Torres v. Seaboard Foods*, No. 113-649 (Okla.), *Deason v. Integris Baptist Med. Ctr.*, No. 113,648 (Okla.), *Mullendore v. Mercy Hosp. Ardmore*, No. 113,560 (Okla.), *Robinson v. Fairview Fellowship Home*, No. 113,735 (Okla.), *Brown v. Claims Mgmt. Res.*, No. 113,609 (Okla.), and *Nowlin v. Medicalodges, Inc.*, No. 113,607 (Okla.) as pending appeals before the Oklahoma Supreme Court).

¹⁴³ Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV., 801, 818 (2010).

Nevertheless, with respect to substance, the alternative benefit plan an employer is permitted to provide (even as it maintains the exclusive remedy rule)¹⁴⁴ 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 title. For 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.¹⁴⁵

A reading of this language might initially show that the substantive core of the traditional Act has been preserved.¹⁴⁶ 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.¹⁴⁷ Perhaps this means that both medical and indemnity benefits are the only benefits available under the Act. Or, perhaps it means something more. In any event, the language does not specify amounts of damage 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, that employee 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 the incapacity;¹⁴⁸ yet, the pivotal issue in workers' compensation claims is often causation.¹⁴⁹ Causation lurks behind seemingly banal phrases such as "covered injuries," "medical management," and "dispute resolution," all of which are explicitly unmoored from the traditional Act.¹⁵⁰ Thus, a causation dispute will often involve sharply contested medical evidence¹⁵¹ that

¹⁴⁴ See DUFF, *supra* note 23, at 326.

¹⁴⁵ OKLA. STAT. ANN. tit. 85A, § 203(B) (2015).

¹⁴⁶ The statute appears to incorporate most of the disability benefits 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. *Id.* § 45(A)-(D).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* § 45(C)-(D).

¹⁴⁹ 82 AMERICAN JURISPRUDENCE: WORKERS' COMPENSATION TO WRONGFUL DISCHARGE § 194 (2d ed. 2013) (hereinafter "AMERICAN JURISPRUDENCE").

¹⁵⁰ OKLA. STAT. ANN. tit. 85A § 203(B) (2015).

¹⁵¹ AMERICAN JURISPRUDENCE, *supra* note 149, at § 543.

will now be weighed, credited, or rejected by employer-designated fact finders subject to ultra-deferential judicial review.¹⁵²

In addition, alternative plans are not required to adhere to the traditional Act's provisions on "medical management."¹⁵³ 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.¹⁵⁴ As observers of injury law are aware, parties to many contested cases provide fact finders with medical opinions that are diametrically opposed on, for example, the cause and duration of a claimant's disability.¹⁵⁵ Presumably under an alternative benefit plan, an employer would have discretion as to whether to pay for the services 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 his preferred physician and the issue of dueling doctors or independent medical examiners becomes extinguished.¹⁵⁶

Paragraph C. of the Oklahoma Employee Injury Benefit Act states:

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.¹⁵⁷

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. Such a determination would typically involve a cautious exercise of judgment in making accurate assessments of the expected lifetime value of a claim, and again in calculating the present value of that claim.¹⁵⁸ These determinations can be complex and subject to dispute.¹⁵⁹ Additionally, the text of the provision 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

¹⁵² Coates v. Fallin, 316 P.3d 924, 926 (Okla. 2013) (Combs, J., dissenting).

¹⁵³ OKLA. STAT. ANN. tit. 85A, § 203(B) (2015).

¹⁵⁴ "Medical management" is a vague term. One assumes it means overall management of a patient by a doctor. *See, e.g.,* Tortorelli v. Mercy Health Center, 242 P.3d 549, 556 n.7 (Okla. Civ. App. Div. 1 2010).

¹⁵⁵ *See* DUFF, *supra* note 23, at 255-56.

¹⁵⁶ OKLA. STAT. ANN. tit. 85A, § 203(B) (2015). Spieler & Burton, *supra* note 67, at 501-02.

¹⁵⁷ OKLA. STAT. ANN. tit. 85A, § 203(C) (2015).

¹⁵⁸ DUFF, *supra* note 23, at 190.

¹⁵⁹ *Id.*

obtain judicial review of the agreement. Furthermore, a plan may authorize settlement agreements and waivers as early as ten business days after an injury,¹⁶⁰ when the magnitude of an injury may still not be fully known. This presents problems similar to pre-injury waivers of injury. While waivers must be conspicuous, nothing in the provision requires that waivers be knowing or intelligent.¹⁶¹ An employee might easily sign away all rights before becoming aware of the magnitude of an injury and, therefore, will have limited access to judicial review thereafter.¹⁶²

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, it remains true that the Oklahoma legislature enacted the system, and courts do not lightly set aside the acts of legislatures.¹⁶³ Further, the system is not irrational if the measure of rationality is saving businesses money. However, if the rights being displaced by the Employee 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,¹⁶⁴ the Oklahoma system may continue to be quite vulnerable to legal attack because of the high risk that, through its operation, injured workers will be deprived of reasonable remedies.¹⁶⁵

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 grant bargain.¹⁶⁶ In those states, legislatures have significantly scaled back the amount or duration of indemnity benefits and limited medical treatment of work-related injuries.¹⁶⁷ In these erosional

¹⁶⁰ OKLA. STAT. ANN. tit. 85A § 203(C) (2015).

¹⁶¹ Valles v. Daniel Constr. Co., 589 S.W.2d 911 913 (Tenn. 1979).

¹⁶² 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. See OKLA. STAT. ANN. tit. 85A, § 203(C) (2015).

¹⁶³ Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U.S. 150, 154-55 (1897).

¹⁶⁴ See *infra* Part IV. B.

¹⁶⁵ See *supra* note 149 and accompanying text.

¹⁶⁶ Grabell & Berkes, *Demolition*, *supra* note 15 and accompanying text.

¹⁶⁷ 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.

National Commission on State Workers' Compensation Laws Act of 2009, H.R. 635, 11th Cong. § 2(3) (2009). Recently, stories in the popular press have been arguing the same point:

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

contexts it has been argued that the societal deal originally struck in the *quid pro quo* of workers' compensation has been breached.¹⁶⁸ 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 justified substitute."¹⁶⁹ 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 convince appellate courts to expand challenges to that extent. One significant historical complication of the erosional argument is that very early versions of workers' compensation statutes provided benefits that were at times substantially less generous than those contained in modern workers' compensation statutes.¹⁷⁰ As a practical matter, from the very start of workers' compensation, benefits varied widely by state and according to historical economic circumstances.¹⁷¹ 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*,¹⁷² a plaintiff challenged the unfolding of the 2003 revisions to Florida's workers' compensation statute.¹⁷³ Plaintiff challenged the requirement that injured workers in some instances be responsible for payment of medical treatment necessitated by their work-related injuries,¹⁷⁴ an obligation that is at odds with core

only shrunk the payments to injured workers; they've also cut them off after an arbitrary time limit—even if workers haven't recovered.

Howard Berkes, *Injured Workers Suffer as 'Reforms' Limit Workers' Compensation Benefits*, NPR (Mar. 4, 2015), <http://www.npr.org/2015/03/04390441655/injured-workers-suffer-as-reforms-limit-workers-compensation-benefits> (last visited June 25, 2016).

¹⁶⁸ Amanda Yoder, *Resurrection of a Dead Remedy: Bringing Common Law Negligence Back into Employment Law*, 75 MO. 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.").

¹⁶⁹ 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. *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356 (Or. 2001) (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).

¹⁷⁰ FISHBACK & KANTOR, A PRELUDE, *supra* note 56, at 174-75 (providing statistical information showing the wide variation in workers' compensation benefit levels from 1911-1930).

¹⁷¹ *Id.*

¹⁷² *Padgett v. State*, No. 11-13661 CA 25, 2014 WL 6685226 (Fla. Cir. Ct. Aug. 13, 2014) (dismissed on procedural grounds). *Padgett* had a complicated procedural history and reviewed *Cortes v. Velda Farms*, No. 11-13661 CA 25 (Fla. Cir. Ct. Aug. 13, 2014), one of a series of consolidated cases. *Cortes* was dismissed on mootness and standing grounds, so the merits were not ultimately discussed by the Florida appellate courts. *State v. Florida Workers' Advocates*, 167 So.3d 500, 504 (Fla. App. 3 Dist. 2015). *Cortes* is nevertheless the focus of the ensuing discussion because it so squarely raised the essential incremental-erosional challenge. Other similar cases are in the pipelines as of this writing. *See, e.g.,* *Castellanos v. Next Door Co.*, 124 So.3d 392, 394 (Fla. App. 1 Dist. 2013), and *Westphal v. City of St. Petersburg*, 122 So.3d 440 (Fla. App. 1 Dist. 2013), *review granted by* *Westphal v. City of St. Petersburg*, 143 So.3d 924 (Fla. 2013). Throughout the discussion, and for procedural reasons I deliberately omit, I will refer to the *Cortes* trial order as "*Padgett*."

¹⁷³ *Id.*

¹⁷⁴ *Padgett*, No. 11-13661 CA 25 at 1-2.

understandings of the nature of workers' compensation.¹⁷⁵ Another major challenge raised was to the 2003 elimination of wage loss benefits for partial incapacity.¹⁷⁶

Padgett commenced when an injured worker sued his employer for negligence.¹⁷⁷ The employer raised the defense of exclusive remedy immunity of the Florida Workers' Compensation Act.¹⁷⁸ In response, the plaintiff amended his complaint, seeking a declaration that the exclusive remedy immunity was both invalid and violated due process under the Fourteenth Amendment of the U.S. Constitution, the open courts, and under provisions of the Florida Constitution.¹⁷⁹ The employer withdrew its exclusive remedy defense, and the court severed it as a party from the declaratory relief portion of the complaint.¹⁸⁰ The employer's exit from the case called into question the existence of a reviewable controversy on standing grounds,¹⁸¹ an issue that would essentially result in the case's dismissal.¹⁸² Reviewability appeared preliminarily to be restored when *Padgett*, a "concrete" workers' compensation beneficiary allegedly harmed by the statute, was allowed to intervene.¹⁸³

Understanding the *Padgett* context requires some work. In 1968, Florida revised its Constitution and Declaration of Rights.¹⁸⁴ 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.¹⁸⁵ In 1970, the legislature amended the Act to, among other things, prevent *injured workers* from opting out of workers' compensation and suing in tort,¹⁸⁶

¹⁷⁵ *Id.* at 3.

¹⁷⁶ *Id.*

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 1998-999 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.

Peter S. Barth, *Compensating Workers for Permanent Partial Disabilities*, 65 SOC. SEC. BULLETIN 16, 18 (2004), <https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4pl6.html>.

¹⁷⁷ *Padgett*, No. 11-13661 CA 25 at 1.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2.

¹⁸⁰ *Id.*

¹⁸¹ For a discussion of the procedural handling of the case, see Thomas Robinson, *Florida Appellate Court Throws Out Judge Cueto's "Padgett" Decision on Procedural Grounds*, THE WORKCOMP WRITER, available at <http://www.workcompwriter.com/how-one-state-bucked-trend-of-allowing-former-spouse-to-access-post-divorce-workers-comp-benefits/> (last visited Apr. 11, 2016).

¹⁸² *Padgett*, No. 11-13661 CA 25 at 1.

¹⁸³ *Id.* *Padgett*, in other words, could demonstrate having suffered a concrete and particularized harm. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (reaffirming that for purposes of standing, "plaintiff must have suffered an 'injury in fact'—an invasion of a legally-protected interest which is . . . concrete and particularized.").

¹⁸⁴ See CONST. OF THE STATE OF FLA. (revised and amended 1968), FLA. SENATE, <http://flsenate.gov/Laws/Constitution>.

¹⁸⁵ *Padgett*, No. 11-13661 CA 25 at 3.

¹⁸⁶ *Id.* at 7.

which, up until that time, had been authorized.¹⁸⁷ No increased benefits were afforded to workers in exchange for relinquishing their right to sue.¹⁸⁸ In 1973, Florida became a comparative (as opposed to a contributory) negligence state.¹⁸⁹ As a result, 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.”¹⁹⁰ Accordingly, stripping workers of the right to sue became a different proposition under tort law, because tort plaintiffs had become eligible to recover damages on a comparative negligence theory, making recovery more likely than it had been in 1970.¹⁹¹ In 2000, the Florida legislature suspended injured workers’ entitlement to partial incapacity indemnity benefits.¹⁹² The Act, as amended in 2003,¹⁹³ required—for the first time—that injured workers pay a portion of medical treatment costs related to their work-related injuries once these workers reached “maximum medical improvement.”¹⁹⁴

Given these developments, the trial court in *Padgett* concluded that the *quid pro quo* of tort for workers’ compensation was no longer adequate.¹⁹⁵ The court opined that partial incapacity attributable to an employer’s negligence in causing a work-related injury would have been fully compensable in negligence prior to the creation of the workers’ compensation remedy, as would medical treatment made necessary by such tortious conduct.¹⁹⁶ Further, the exclusive remedy rule reduced aggregate liability for employers,¹⁹⁷ but because of the reduction in workers’ compensation benefits there was no longer a truly correlative benefit for workers.¹⁹⁸ Thus, the nature of the *quid pro quo* changed.¹⁹⁹ The court appeared to have accepted the

¹⁸⁷ 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. *Id.* at 3-4. 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.

¹⁸⁸ *Id.* at 8.

¹⁸⁹ *Id.* at 7.

¹⁹⁰ *German-American Lumber Co. v. Hannah*, 53 So. 516, 517 (Fla. 1910).

¹⁹¹ 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 Bradley v. Appalachian Power Co.*, 256 S.E.2d 87, 882-83 (W.Va. 1979).

¹⁹² *Padgett*, No. 11-13661 CA 25 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 OKLA. STAT. ANN. tit. 85A, § 203(B)* (2015) (discussing 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*, No. 11-13661 CA 25 at 4.

¹⁹³ FLA. STAT. ANN. § 440.13(14)(c) (West 2012).

¹⁹⁴ “Notwithstanding any other provision of this chapter, following overall maximum medical improvements 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.” *Id.* For a definition of “Maximum Medical Improvement,” *see infra* note 214, § 560.

¹⁹⁵ *Padgett*, No. 11-13661 CA 25 at 19-20.

¹⁹⁶ *Id.* at 3, 8. 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.

¹⁹⁷ *Id.* at 4.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 16, 18.

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.²⁰⁰

The unified narrative from *Padgett* provides that, at the time of the creation of the Florida exclusive remedy rule in 1935,²⁰¹ 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.²⁰² However, Florida's replacement of contributory negligence with comparative negligence²⁰³ meant that, if negligence could be established, workers were much more likely to enjoy some recovery in tort. To the extent recovery would exceed the typical workers' compensation remedy of two-thirds of the average weekly wage at the time of the injury,²⁰⁴ 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,²⁰⁵ but not in workers' compensation.²⁰⁶ Similarly, an injured worker might be able to achieve in tort complete recovery for medical expenses related to a work injury,²⁰⁷ while under the present workers' compensation system in Florida there is a chance for less-than-full recovery for medical treatment required by a work-related injury.²⁰⁸ 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.²⁰⁹ The argument might continue that the absence of worker premiums for changes in tort law amounted to a windfall for employers.²¹⁰ Under these circumstances, maintaining the exclusive remedy rule is no longer supportable.²¹¹

Florida courts faced similar arguments in recent years, but in slightly different contexts. For example, in *Westphal v. City of St. Petersburg*,²¹² a Florida appellate court was faced with an interpretation of the Florida Workers' Compensation Act that effectively left certain classification of totally incapacitated workers without any remedy for workplace injury.²¹³ In *Westphal*, workers with temporary total disability for the maximum statutory period for entitlement to benefits had not yet been found to have reached maximum medical improvement²¹⁴—a condition precedent for transitioning from temporary to *permanent* benefits.²¹⁵ Thus, their entitlement to workers' compensation benefits simply expired, even though they continued to be totally disabled as a factual matter.²¹⁶ Accordingly, an

²⁰⁰ See *id.* at 18 (explaining that after losing option of tort litigation, employees no longer have right to sue for injuries).

²⁰¹ *Id.* at 6.

²⁰² *Id.* at 12.

²⁰³ *Hoffman v. Jones*, 280 So.2d 431, 436-37 (Fla. 1973).

²⁰⁴ FLA. STAT. ANN. § 440.15(1)(a), (2)(a), (4)(a) (West 2012).

²⁰⁵ *Padgett*, at 16.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 4.

²⁰⁸ *Id.* at 4, 8.

²⁰⁹ *Id.* at 7.

²¹⁰ *Id.* at 3-4.

²¹¹ *Id.* at 19-20.

²¹² 122 So. 3d 440 (Fla. Dist. Ct. App. 2013).

²¹³ *Id.* at 444.

²¹⁴ 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 (2013).

²¹⁵ *Id.*

²¹⁶ *Westphal v. City of St. Petersburg*, 122 So. 3d 440, 443 (Fla. Dist. Ct. App. 2013).

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.²¹⁷ 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. . . . [W]e 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.²¹⁸

The strong implication was that workers left with no recovery might have a basis for a constitutional challenge premised on the lack of any remedy for injury.²¹⁹ In *Padgett*, the trial court relied heavily on the Florida Supreme Court’s opinion in *Martinez v. Scanlan*.²²⁰ 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.²²¹ 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

²¹⁷ *Id.* at 446.

²¹⁸ *Id.* at 447-48.

²¹⁹ *Westphal* was recently reviewed by the Florida Supreme Court, which held that:

[Section 440.15(2)(a)] of the workers’ compensation statute is unconstitutional under article I, section 21, of the Florida Constitution, as a denial of the right of access to courts, because it deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time—thereby creating a system of redress that no longer functions as a reasonable alternative to tort litigation.

Westphal v. City of St. Petersburg, No. SC13-1930 (Fla. June 9, 2016).

²²⁰ 582 So. 2d 1167 (Fla. 1991).

²²¹ *Martinez v. Scanlon*, 582 So. 2d 1167, 1170-73 (Fla. 1991).

alternative of tort litigation in these instances. As to this attack, the statute passes constitutional muster.²²²

With respect to the language in *Martinez* (contentions that the trial judge accepted), the plaintiff and *Padgett* argued that recent developments had undercut *Martinez*'s rationale as to workers' compensation as a reasonable alternative to tort litigation.²²³ 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.²²⁴ The plaintiff next argued that, in light of the benefit reductions, injured workers are now authorized to proceed in tort.²²⁵ The important conceptual point made 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.²²⁶ *Martinez* essentially opened the door for *Padgett* and for 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,"²²⁷ and Florida is no exception. Article I, Section 21 of the Florida Constitution states that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."²²⁸ This language may suggest that there must be at least some substantive remedy for injury, and cases such as *Westphal*, raising scenarios in which workers might be left with no remedy,²²⁹ 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.²³⁰

A second potent, anti-erosional feature of Florida law was showcased in *Kluger v. White*.²³¹ There, the Florida Supreme Court considered a law providing that tort actions in connection with automobile accidents were completely abolished where a putative plaintiff carried automobile insurance or where a plaintiff without insurance suffered damages of less than \$550.²³² In *Kluger*, because the fair market value of the plaintiff's damaged automobile was \$250, she could receive no more than that amount under Florida law.²³³ Because she also carried no insurance, the plaintiff was effectively without a remedy for damages.²³⁴ The court held that this abolishment of the remedy violated the Florida open courts provision.²³⁵ 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

²²² *Id.* at 1171-72.

²²³ *Padgett* at 16.

²²⁴ *Id.*

²²⁵ *Id.* at 4.

²²⁶ *Padgett* at 16.

²²⁷ *See infra* Part IV.

²²⁸ FLA. STAT. ANN., CONST., art. 1, § 21 (West 1970).

²²⁹ *Westphal v. City of St. Petersburg*, 122 So. 3d at 448.

²³⁰ *See infra* Part IV. A.

²³¹ 281 So. 2d 1 (Fla. 1973).

²³² *Id.* at 2.

²³³ *Id.* at 2-3.

²³⁴ *Id.* at 3.

²³⁵ For text of the provision, *see* FLA. STAT. ANN., CONST., art. 1, § 21 (West 1970).

party.”²³⁶ Noting that Florida’s Declaration of Human Rights had previously been found binding on the legislature,²³⁷ the court recited the following language from the *Corpus Juris Secundum*:

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.²³⁸

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,²³⁹ 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.”²⁴⁰ The court then went on to announce principles that are germane to the workers’ compensation discussion:

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.²⁴¹

Thus, as the argument goes in *Padgett*, because the workers’ compensation *quid pro quo* pre-dated 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.”²⁴² 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 for meeting such public necessity can be shown.”²⁴³ The rejoinder to the argument is that an amendment to the workers’ compensation statute is not an abolishment. However, this

²³⁶ *Kluger*, 281 So. 2d at 3 (internal citation omitted).

²³⁷ *Id.* at 4.

²³⁸ *Id.* at 3-4 (citing 16A C.J.S. *Constitutional Law* § 710, 1218-19 (1956)).

²³⁹ *Id.* at 4.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

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.”²⁴⁴ 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.²⁴⁵

D. Concluding Thoughts on State-Specific Contexts

Whether authorizing opt-out, as in Texas and Oklahoma,²⁴⁶ or enacting incremental-erosional changes in medical and permanent partial incapacity benefits, as in Florida,²⁴⁷ states can anticipate pushback by plaintiffs to workers' compensation benefit reduction. 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 Part. 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,²⁴⁸ a rate of implementation that would be the envy of many *federal* statutes.²⁴⁹ With current total national workers' compensation expenditures at just under 60 billion dollars per year,²⁵⁰ plaintiffs and defendants in various statutes 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.²⁵¹ Part IV, *infra*, 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 are akin to even broader challenges to tort reform seeking to reduce plaintiff remedies. Because workers' compensation was the personal injury substitute for tort,²⁵² significant incursions on workers' compensation should be seen in the same way as interference with tort. Assuming a court were to accept this

²⁴⁴ *Id.*

²⁴⁵ *See infra* Part IV.

²⁴⁶ *See supra* Part III. A., B.

²⁴⁷ *See supra* Part III. C.

²⁴⁸ FISHBACK & KANTOR, A PRELUDE, *supra* note 56, at 103-04.

²⁴⁹ *Id.* at 93-94, 100-01.

²⁵⁰ *See 2016 Liberty Mutual Workplace Safety Index*, *supra* note 79.

²⁵¹ Goldberg, *supra* note 33, 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.”).

²⁵² FISHBACK & KANTOR, A PRELUDE, *supra* note 56, at 4.

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 that 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.²⁵³ At the state level, however, plaintiffs have occasionally made headway by 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.²⁵⁴ One variation of the argument is that benefit reductions result in inadequate or unreasonably low compensation,²⁵⁵ effecting a breach in the original “grand bargain” or *quid pro quo* in which workers surrendered their tort rights for reasonable alternative compensation.²⁵⁶ Another variation of state constitutional argument centers on “right to a remedy” provisions.²⁵⁷ As will be discussed in more detail below,²⁵⁸ *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.²⁵⁹

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,²⁶⁰ and under provisions that prohibit special legislation²⁶¹ and require separation of governmental powers.²⁶² This Article addresses each of these theories, but will focus on challenges centered on right to a remedy and open courts, the *quid pro quo* category of due process, and state constitutional equal protection.

A. Right to a Remedy and Open Courts

²⁵³ Compare *New York C.R. Co. v. White*, 243 U.S. 188, 197 (1917) (“[T]he whole common-law doctrine of employer’s liability for negligence . . . is based upon fictions, and is inapplicable to modern conditions of employment.”), with *Duke Power Co. v. Carolina Env’tl. Study Grp.*, 438 U.S. 59, 87-88 (1978) (rejecting tort-based challenge to preemption under the Price-Anderson Act, repeating maxim that no one has a vested right in a rule of common law), and *Morris v. Savoy*, 576 N.W.2d 765, 770 (Ohio 1991) (“[T]he statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective.”). See also *infra* Part IV. C. (further discussing the holding in *Morris*), and *infra* Part V. A. (discussing that *Duke Power* endorsed heightened judicial scrutiny of tort modifications, while denying it was doing so).

²⁵⁴ See *Carson v. Maurer*, 424 A.2d 825, 840 (N.H. 1980) (citing *Briscoe Co. v. Rutgers*, 327 A.2d 687, 690 (N.J. 1974), and *Hunter v. North Mason Sch. Dist.*, 539 P.2d 845, 848 (Wash. 1975)); see also *infra* Part IV. C.

²⁵⁵ FISHBACK & KANTOR, A PRELUDE, *supra* note 56, at 64.

²⁵⁶ *Padgett* at 19-20. It is a question for another day whether workers in any meaningful sense ever bargained; early twentieth century unions were involved in the discussion, but I am not convinced that sufficiently large blocks of workers negotiated for the eventful bargain. FISHBACK & KANTOR, A PRELUDE, *supra* note 56, at 64-67.

²⁵⁷ Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003) (speech delivered by Chief Justice of the Supreme Court of Texas “on February 28, 2002 for the annual Justice William J. Brennan Lecture on State Courts and Social Justice at New York School of Law.”).

²⁵⁸ See *infra* Part IV. A.

²⁵⁹ Phillips, *supra* note 257, at 1335.

²⁶⁰ Goldberg, *supra* note 33, at 527 n.5.

²⁶¹ *Id.*

²⁶² *Id.*

“Right to a remedy” language is often located in the “open courts” provision of state constitutions²⁶³ and has sometimes been interpreted as ensuring a substantive remedy to litigants, rather than merely guaranteeing that courthouse doors will remain open to citizens.²⁶⁴ Right to a remedy and open court provisions have ancient roots in the Magna Carta.²⁶⁵ The current right to a remedy and 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.²⁶⁶

The ancient language itself read:

[E]very subject of this realme, for injury done to him . . . by any other subject . . . without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.²⁶⁷

Some state courts have concluded, primarily in the context of litigation over tort or medical malpractice reform,²⁶⁸ that the right to remedy and open courts language in their constitutions means that citizens should have a right to an adequate substantive remedy.²⁶⁹ Some open courts provisions explicitly include the phrase “right to a remedy,”²⁷⁰ but there are also variations to this language.²⁷¹ As already noted,²⁷² 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.²⁷³ Because some states afford citizens the practical equivalent of vested rights to remedies, some notable commentators

²⁶³ Phillips, *supra* note 257, at 1311.

²⁶⁴ *Id.* at 1310.

²⁶⁵ *Id.* Or perhaps in one of its “restatements” by Sir Edward Coke in the Institutes. *Id.* at 1311.

²⁶⁶ ART. 1 PA. STAT. AND CONS. STAT. ANN. § 11 (West 2011).

²⁶⁷ Ned Miltenberg, *The Revolutionary ‘Right to a Remedy,’* 34 TRIAL 48, 49 (Mar. 1998) (quoting Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF England A6, 55-56 (E&R Brooke ed. 1797)).

²⁶⁸ Phillips, *supra* note 261, at 1332-34.

²⁶⁹ See, e.g., *Condemarin v. University Hosp.*, 775 P.2d 348, 365 (Utah 1989) (concluding that arbitrary limit on tort damages awarded by juries impinged on both the right to a remedy and right to a jury trial because it was the historic province of the jury to award damages).

²⁷⁰ Phillips, *supra* note 257, at 1310.

²⁷¹

[There are] 27 state constitutions that require courts to be open, 36 that require justice to be administered promptly, 27 that require justice to be administered without purchase or sale, 34 that require justice to be granted completely and/or without denial, and 11 that require justice to be delivered freely. Additionally, 35 states provide a right to a remedy, of which 21 require the remedy to be by due process or due course of law.

Id. at n.5 (citing 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES app. 6 at 6-65 to 6-67 (3d ed. 2000)).

²⁷² See *supra* Part III. C.

²⁷³ *Kluger v. White*, 281 So. 2d 1, 7 (Fla. 1973).

have opined that individual rights are, at times, better protected by state constitutions than by their federal counterpart.²⁷⁴

“Right to a remedy” and open courts arguments were featured prominently in *Smother v. Gresham Transfer, Inc.*²⁷⁵ In the case, a truck shop lube technician 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.”²⁷⁶ The technician filed a workers’ compensation claim, which was denied by his employer’s insurance carrier.²⁷⁷ Ultimately the Workers’ Compensation Board of the State of Oregon upheld the denial,²⁷⁸ finding that the technician’s work was not the “major contributing cause of his injuries”²⁷⁹ and that he did not have “compensable injury” under the workers’ compensation statute.²⁸⁰ 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 to do so.²⁸¹ Thus, the technician in *Smother* was in the same position as the Florida plaintiffs in *Westphal* and *Kluger*. Each of these plaintiffs was completely cut off from any remedy for personal injury,²⁸² in a sense of conceptually easier scenario than one in which the “adequacy” of a remedy is under dispute.²⁸³

On appeal, the technician in *Smother* argued that the court’s application of the Oregon exclusive remedy rule violated, among other things, the remedy clause of the Oregon Constitution.²⁸⁴ The Oregon Court of Appeals rejected the argument, stating:

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.²⁸⁵

²⁷⁴ See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

²⁷⁵ 23 P.3d 333 (Or. 2001). The case was overturned as this Article went to press in *Horton v. Oregon Health and Science University*, --P.3d--, 359 Or. 168 (Or. 2016). However, the author is of the opinion that the case will continue to be influential in the back-and-forth arguments surrounding the limits of legislative supremacy over tort reform. The case will undoubtedly continue to be an example in Oregon and elsewhere, so its close analysis in this article will be retained.

²⁷⁶ The appellate court chronicled the facts in *Smother v. Gresham Transfer, Inc.*, 941 P.2d 1065, 1066 (Or. App. 1997).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Smother*, 941 P.2d at 1066; *Westphal*, 122 So.3d at 443; *Kluger*, 281 So. 2d at 5.

²⁸³ 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.

²⁸⁴ 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.” OR. REV. STAT. ANN. CONST. Art. I, § 10 (West 2014).

²⁸⁵ *Smother*, 941 P.2d at 1068.

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,²⁸⁶ and, if the legislature wanted to extinguish either or both sets of rights, it had plenary power to do so.²⁸⁷ While it could not, of course, create a right and then deny a remedy,²⁸⁸ this was not the situation. While there may be no right without a remedy, there is also no remedy without a right.²⁸⁹

The Oregon Supreme Court reversed the appellate court's decision in *Smothers*²⁹⁰ in the only way logically possible. The court found the existence of a substantive right in the remedies clause of the state constitution²⁹¹ and drew on a great deal of history in doing so.²⁹² The argument has been that Magna Carta and the history of open courts and remedies provisions²⁹³ did not appear 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."²⁹⁴ The right to a remedy for injury derives from Magna Carta,²⁹⁵ and the seventeenth century articulation of it from Lord Coke may be found in the constitutions of eleven states.²⁹⁶

The Oregon Supreme Court, as well as numerous scholars, have traced a taxonomy of rights—that would have been familiar to the founders, adopters of the early remedy provisions²⁹⁷—to Blackstone's Commentaries,²⁹⁸ in which the rights of persons at common law were divided into "absolute" and "relative" rights.²⁹⁹ Among the absolute rights were those of personal security, personal liberty, and private property.³⁰⁰ Absolute rights, according to Blackstone, could not be protected simply by declaring them; they had to be subject to vindication.³⁰¹ The "right to a remedy" was one of five subordinate rights allowing vindication of absolute rights.³⁰² Once a person suffered injury to one of those rights, an "adequate remedy" automatically attached.³⁰³

The Blackstone formulation was not conceived as a "due process" protection because the threat of encroachment on rights arose from the Crown and from private actors, not from the legislature.³⁰⁴ Nevertheless, the right to a remedy existed within Blackstone's "natural law"

²⁸⁶ *Id.* at 1067.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1068.

²⁸⁹ Professor Bauman refers to this as a "circular maxim." John H. Bauman, *Remedies in State Constitutions and the Proper Role of the State Courts*, 26 WAKE FOREST L. REV. 237, 281 (1991).

²⁹⁰ *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 363 (Or. 2001).

²⁹¹ *Id.* at 339.

²⁹² *Id.* at 340.

²⁹³ *Id.* at 341.

²⁹⁴ Phillips, *supra* note 257, at 1310.

²⁹⁵ *Id.*

²⁹⁶ "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." *Id.* at 1311.

²⁹⁷ *Smothers*, 23 P.3d at 350.

²⁹⁸ *Id.* at 342.

²⁹⁹ Phillips, *supra* note 257, at 1321 n.42.

³⁰⁰ *Id.*

³⁰¹ SIR WILLIAM BLACKSTONE, KNIGHT, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 63 (2d ed. 1884).

³⁰² Phillips, *supra* note 257, at 1321.

³⁰³ BLACKSTONE, *supra* note 301, at 68.

³⁰⁴ *But see* Lord Coke's controversial *Dr. Bonham's Case* (1610) 77 Eng. Rep. 646, 652; 8 Co. Rep. 113 b, 118 a (ruling that "[I]n many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be

rights taxonomy.³⁰⁵ 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.³⁰⁶

The Supreme Court's opinion in *Smothers* followed a similar line of reasoning.³⁰⁷ 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.³⁰⁸ It is a long story,³⁰⁹ 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.³¹⁰

From that resolution, it was a short step for the court to conclude that *Smothers* had been deprived of his remedy.³¹¹ Then, the court conceptually went one step further: not only was it impermissible to deprive a citizen of a remedy, it was equally impermissible to deprive him of a plainly inadequate remedy.³¹² 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, 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

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.").

³⁰⁵ Phillips, *supra* note 257, at 1331.

³⁰⁶ *Id.*

³⁰⁷ *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 350 (Or. 2001).

³⁰⁸ *Id.* at 340-46.

³⁰⁹ And one that is beyond the scope of my present inquiry. For a concise and penetrating account, *see generally* Goldberg, *supra* note 33, at 560-68.

³¹⁰ *Smothers*, 23 P.3d at 353.

³¹¹ *Id.* at 362.

³¹² *Id.*

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.³¹³

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.³¹⁴ 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.³¹⁵

Utilization of this rubric reveals opinions from Florida and Oregon already discussed as undertaking primarily “historically-tied approaches.”³¹⁶ Challenges to opt-out and significant incremental-erosional modifications to workers’ compensation statutes would likely have the greatest success in those jurisdictions in which courts have been sympathetic to such historical arguments within 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.³¹⁷

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.”³¹⁸ However, this approach leaves open the possibility that substitution may lawfully be “unreasonable” when the legislature is acting for an important

³¹³ *Id.* at 354 (internal citations omitted).

³¹⁴ *Id.* at 362.

³¹⁵ FRIESEN, *supra* note 271, at § 6-2(c), 6-9. For examples of the historically tied approach, see *Bryant v. Cont’l Conveyor & Equip. Co.*, 751 P.2d 509, 511 (Ariz. 1988), and *Christianson v. Pioneer Furniture Co.*, 77 N.W. 174, 175 (Wis. 1898). For examples of the public policy approach, see *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634, 645 (W. Va. 1991), and *Robinson v. Charleston Area Med. Ctr., Inc.*, 414 S.E.2d 877, 884-85 (W. Va. 1991). For an example of the legislative power approach, see *Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 493 (Mont. 1989).

³¹⁶ See *Smothers*, 23 P.3 at 338, and *Kluger*, 281 So. 2d at 4.

³¹⁷ *Smothers*, 23 P.3d at 362.

³¹⁸ *Id.* at 360.

reason or responding to an overwhelming public need.³¹⁹ 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 those courts' analyses.³²⁰

Nevertheless, in all but legislative power jurisdictions, it would seem likely that opt-out challengers 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.³²¹

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"³²² and that "it is hard to decide exactly what 'common law' is made fundamental by the [remedy] provision."³²³ 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."³²⁴ 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 matures on the origins of the "right to a remedy" and open courts provisions.

Theories of legislative supremacy, on the other hand, challenge historically-tied attempts to ward off tort reform.³²⁵ These theories hold that the authority of the legislature should govern absolutely in all areas not explicitly closed off by constitutional guarantee.³²⁶ In a legislative supremacy environment, no personal injury litigant will get anywhere unless persuading a court of explicit guarantees of remedies for personal injury,³²⁷ which will not exist. In *Meech v. Hillhaven West*,³²⁸ for example, the plaintiff sought damages for wrongful termination, breach of the implied covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, for allegedly oppressive, malicious, unjustifiable conduct by his employer, and ultimately for wrongful discharge.³²⁹ Montana had enacted the Wrongful Discharge from Employment Act,³³⁰ which, by its terms, "preempted" common law remedies.³³¹ The plaintiff in

³¹⁹ FRIESEN, *supra* note 271, at § 6-2(c), 6-9.

³²⁰ FRIESEN, *supra* note 271, at § 6-2(c), 6-9.

³²¹ Bauman, *supra* note 289, at 262.

³²² *Id.* at 283.

³²³ *Id.*

³²⁴ Lawrence B. Solum, *Originalism and Constitutional Construction*, 22 FORDHAM L. REV. 453, 469 (2013).

³²⁵ FRIESEN, *supra* note 271, at § 6-2(c), 6-9 and accompanying text.

³²⁶ FRIESEN, *supra* note 271, § 6-2(c), 6-9.

³²⁷ FRIESEN, *supra* note 271, § 6-2(c), 6-8.

³²⁸ 776 P.2d 488, 488 (Mont. 1989).

³²⁹ *Id.* at 490.

³³⁰ MONT. CODE ANN. § 39-2-901 (2015).

³³¹ *Meech*, 776 P.2d at 490.

Meech challenged the statutory preemption of his tort claims on several grounds, including those under Montana’s unified constitutional “right to a remedy” and “open courts” provision.³³² 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.” 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.³³³

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.³³⁴ Under 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.*,³³⁵ the Oklahoma Supreme Court, in connection with the state constitutional remedy provision, stated:

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.³³⁶

A number of states see matters in much the same way.³³⁷ And, whether the remedies provision may be used to imply a substantive personal injury right of redress requires a state-by-state assessment.

³³² *Id.*

³³³ *Id.* at 495-96 (internal citations omitted) (quoting Black’s Law Dictionary 345 (4th ed. 1979)).

³³⁴ *Id.* at 493-94.

³³⁵ 162 P. 938 (Okla. 1917).

³³⁶ *Id.* at 942.

³³⁷ FRIESEN, *supra* note 271, § 6-2(c), 6-6.

B. *State Quid Pro Quo*

Quid pro quo is essentially a due process concept.³³⁸ Therefore, this article will address the theory in that manner, reserving traditional due process analysis for the next Part on federal theories of restraint.³³⁹ 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* and failed to reject the theory in the case of *Duke Power Co. v. Carolina Environmental Study Group*.³⁴⁰

Some states have adopted and developed the *quid pro quo* theory³⁴¹—that remedy for loss of an “important” common law right may not be dissolved by a legislature without provision of an adequate substitute,³⁴² which may take on different forms. In *Kansas Malpractice Victims Coalition v. Bell*,³⁴³ for example, the plaintiffs challenged medical malpractice caps and a requirement that they take future damages over time in the form of an annuity.³⁴⁴ 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.³⁴⁵

Tracing a long line of Kansas cases,³⁴⁶ the court set out a two-step analysis in which it first determined whether the plaintiff’s right to a remedy had been limited.³⁴⁷ Then, finding that it had been limited,³⁴⁸ the court moved on to assess whether the plaintiff had, notwithstanding the limitation, received from the legislature an adequate substitution remedy.³⁴⁹ The court found that he had not.³⁵⁰

³³⁸ 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).

³³⁹ See *infra* Part V.

³⁴⁰ 438 U.S. 59 (1978).

³⁴¹ See *supra* note 145 and accompanying text.

³⁴² *Id.*

³⁴³ 757 P.2d 251, 253 (Kan. 1988), *disapproved but not reversed*, Bair v. Peck, 811 P.2d 1176, 1991 (1991).

³⁴⁴ *Bell*, 757 P.2d at 255.

³⁴⁵ *Id.* at 258.

³⁴⁶ 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. *Id.* at 263.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 260.

In *Texas Workers' Compensation v. Garcia*,³⁵¹ the Texas Supreme Court considered a broad attack on the constitutionality of the 1989 amendment of the Texas Workers' Compensation Act.³⁵² 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, jury trial, and obligation of contract."³⁵³ The lower courts sustained a majority of the challenges and struck the Texas Act.³⁵⁴ 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.³⁵⁵

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."³⁵⁶ Thus, the court agreed on the critical *quid pro quo* point. However, the court nevertheless upheld the Texas Workers' Compensation Act under the essential open courts challenge.³⁵⁷ 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

³⁵¹ 893 S.W.2d 504 (Tex. 1995).

³⁵² *Id.* at 516.

³⁵³ *Id.* at 510.

³⁵⁴ *Id.* at 516-17.

³⁵⁵ *Id.* at 520, *citing* *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994) (quoting *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955)); *accord* *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983), *and* *Waites v. Sondock*, 561 S.W.2d 772, 774 (Tex. 1977).

³⁵⁶ *Garcia*, 893 S.W.2d at 521.

³⁵⁷ *Id.* at 523.

produces a more limited but more certain recovery, renders the Act an adequate substitute for purposes of the open courts guarantee.³⁵⁸

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 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*.³⁵⁹ 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 likely 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.³⁶⁰ It seems difficult 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.³⁶¹

Taking a different approach from the Texas court in *Garcia*, on the other hand, the California Supreme Court, in *Fein v. Permanente Medical Group*,³⁶² appeared to doubt the independent existence under due process of a *quid pro quo* requirement.³⁶³ In *Fein*, an attorney who was suffering from a heart attack had been misdiagnosed on several occasions as experiencing only muscle spasms.³⁶⁴ The attorney, who suffered harm from the misdiagnosis, sued in tort.³⁶⁵ The attorney prevailed at trial, but, under a tort reform statute, was limited to noneconomic damages of \$250,000.³⁶⁶ The California Supreme Court rejected several challenges to this limitation, concluding that the legislature's decision to limit noneconomic liability was not irrational.³⁶⁷ In a footnote to its decision, 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.³⁶⁸ "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

³⁵⁸ *Id.* at 521 (internal citations omitted).

³⁵⁹ *Padgett v. State*, No. 11-13661 CA 25, 2014 WL 6685226 (Fla. Cir. Ct. Aug. 13, 2014) (dismissed on procedural grounds).

³⁶⁰ FISHBACK & KANTOR, A PRELUDE, *supra* note 56, at 13.

³⁶¹ On the other hand, if negligence cases are routinely shunted into arbitration, the underlying doctrinal question may not be addressed.

³⁶² 695 P.2d 665 (Cal. 1985).

³⁶³ *Id.* at 681-82, n. 18.

³⁶⁴ *Id.* at 669.

³⁶⁵ *Id.* at 670.

³⁶⁶ "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.

³⁶⁷ *Id.* at 678.

³⁶⁸ *Id.* at 681-82, n. 18.

legislation imposes on malpractice plaintiffs.”³⁶⁹ 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.³⁷⁰ 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.³⁷¹

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.³⁷² 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 provisions³⁷³ (some of which were not enacted until the gilded age)³⁷⁴ 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.”³⁷⁵

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.³⁷⁶ On the easiest rendering of federal law, because the right to a recovery for physical injury has not been deemed fundamental, and because physically injured workers or persons do not make up a traditional suspect or quasi-suspect classification,³⁷⁷ state laws applicable to them are subject only to deferential rational

³⁶⁹ *Id.* 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*.

³⁷⁰ See *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988) (rejecting argument).

³⁷¹ See *Wright v. Cent. Du Page Hosp. Ass’n*, 347 N.E.2d 736, 742 (Ill. 1976).

³⁷² *Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 74 (Neb. 2003). See generally *Adams v. Children’s Mercy Hosp.*, 832 S.W.2d 898, 906 (Mo. 1992), *overruled on other grounds*, *Watts v. Lester E. Cox Med. Ctr.*, 376 S.W.3d 633 (Mo. 2012) (“[T]he 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.”)

³⁷³ *Jones v. State Bd. of Med.*, 555 P.2d 399, 404-05 (Idaho 1976) (rejecting *quid pro quo* altogether and adopting the reasoning of the Colorado courts: that because the state constitution did not adopt the common law of England, the state may modify it at will).

³⁷⁴ For example, Colorado’s Constitution was ratified in 1876, Idaho’s in 1890, Kansas’ in 1861, Nevada’s in 1864, and South Dakota’s in 1889. See generally, ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES 45, 98, 135, 242, 364 (1998).

³⁷⁵ Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1643 (2004).

³⁷⁶ *Craig v. Boren*, 429 U.S. 190, 202-04 (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).

³⁷⁷ 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,

basis review.³⁷⁸ The U.S. Supreme Court has directly addressed this rational basis review, opining that “[i]n 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.”³⁷⁹ However, not all state courts take this path with respect to interpretation of the equal protection provisions of their own constitutions.

In *Carson v. Mauer*,³⁸⁰ the New Hampshire Supreme Court took the view that “the right to recover for personal injuries is . . . an important substantive right,”³⁸¹ when it struck several provisions of a medical malpractice statute.³⁸² Among challenges to the statute was that it violated equal protection under the state constitution.³⁸³ 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.”³⁸⁴ Thus, the court accepted the factual predicates upon which the legislature has concluded that medical malpractice reform was necessary.³⁸⁵ 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.”³⁸⁶ Nevertheless, the *Carson* 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* . . . 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

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.”)

³⁷⁸ *Id.* at 1016.

³⁷⁹ *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (citations omitted).

³⁸⁰ 424 A.2d 825 (N.H. 1980), *reaffirmed* by *Brannigan v. Usitalo*, 587 A.2d 1232, 1233 (N.H. 1991), *overruled on other grounds* by *Cnty. Res. For Justice, Inc. v. City of Manchester*, 917 A.2d 707, 721 (N.H. 2007).

³⁸¹ *Carson*, 424 A.2d at 830.

³⁸²

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.

Id. at 829.

³⁸³ *Id.* at 831.

³⁸⁴ *Id.* (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

³⁸⁵ *Id.*

³⁸⁶ *Id.* (citations omitted).

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.³⁸⁷

While the court recognized that it was applying a scrutiny exceeding that applied in connection with Equal Protection review under the U.S. Constitution,³⁸⁸ the majority stated: “[W]e are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires.”³⁸⁹ 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, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.”³⁹⁰

Although *Carson* has subsequently been reversed on other grounds,³⁹¹ the “important substantive right” formulation continues to trigger intermediate scrutiny in New Hampshire.³⁹² 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 by requiring the state government 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*,³⁹³ for example, the Ohio Supreme Court considered a constitutional challenge to a medical malpractice statute.³⁹⁴ Although it struck two of the challenged provisions on due process grounds,³⁹⁵ the court rejected the plaintiffs’ equal protection challenge.³⁹⁶ 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.”³⁹⁷ 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.”³⁹⁸ These conclusions seem more than a little inconsistent. The *Carson* court³⁹⁹ had also been willing to unflinchingly accept the legislative facts that surrounded the involved statute’s enactment, as it simultaneously rejected as arbitrary the conclusions flowing

³⁸⁷ *Id.* at 830 (citing *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 667 (1979)).

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 831 (citations omitted).

³⁹⁰ *Gonya v. Comm’r N.H. Ins. Dep’t*, 899 A.2d 278, 289 (N.H. 2006) (citing *Carson*, 424 A.2d at 831).

³⁹¹ *Cnty. Res. For Justice, Inc. v. City of Manchester*, 917 A.2d 707, 721 (N.H. 2007) (clarifying that the government had “[t]he burden [of] demonstrat[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.’”) (citations omitted).

³⁹² *Carson*, 424 A.2d at 830. *See also Gonya*, 899 A.2d at 289.

³⁹³ 576 N.W.2d 765 (Ohio 1991).

³⁹⁴ *Id.* at 767. The challenge was to certain liability caps and the imposition of a collateral source rule. *Id.*

³⁹⁵ *Id.* at 771.

³⁹⁶ *Id.* at 772.

³⁹⁷ *Id.* at 771.

³⁹⁸ *Id.* at 770 (citations omitted).

³⁹⁹ 424 A.2d 825 (N.H. 1980).

from those facts.⁴⁰⁰ 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.⁴⁰¹ In workers' compensation contexts there have been few successful equal protection challenges by plaintiffs or defendants.⁴⁰² The reason for this is likely that the public policy rationale at the time of the enactment of workers' compensation statutes would have survived what we now call strict scrutiny, let alone survive more deferential standards of review.⁴⁰³ 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.⁴⁰⁴

⁴⁰⁰

[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.

Id. at 838 (emphasis added).

⁴⁰¹ *Morris* itself cites several cases, which declined to apply heightened scrutiny on an equal protection theory. *See, e.g.,* Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153, 1159, 1161 (N.M. 1998); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 534 (Va. 1989); and Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 597 (Ind. 1980).

⁴⁰² But see Vasquez, CM-2014-11060L (Okla. Workers' Comp. Comm'n) (Feb. 26, 2016), and *supra* note 139 (striking Oklahoma's Injury Benefit Act at the administrative level in part on equal protection grounds).

⁴⁰³ As John Fabian Witt wrote in *The Accidental Republic*, the workplace injury situation in the late 19th and early 20th 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.

JOHN F. WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 2-3 (2004).

⁴⁰⁴ *Richardson*, 763 P.2d at 1163 (emphasis omitted), citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1609-10 (2d ed. 1988).

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—such as opt-out—are economically beneficial. If those courts also 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. To illustrate, in *Estate of McCall v. United States*,⁴⁰⁵ the Florida Supreme Court struck Florida's statutory cap on wrongful death noneconomic damages recoverable in a medical malpractice action.⁴⁰⁶ In that case, decedent died as a result of negligent medical treatment during and after childbirth by Air Force medical personnel.⁴⁰⁷ The plaintiffs, decedent's survivors, alleged medical malpractice and filed a wrongful death action under the Federal Tort Claims Act.⁴⁰⁸ The court found the United States liable and that the plaintiffs' economic and noneconomic damages were \$980,462.40 and \$2 million, respectively.⁴⁰⁹ Notwithstanding these findings, the court limited the plaintiffs' recovery of wrongful death noneconomic damages to \$1 million in accordance with Florida's statutory cap on wrongful death noneconomic damages based on medical malpractice claims.⁴¹⁰ The court also denied a motion challenging the constitutionality of Florida's wrongful death statutory cap under both the Florida and United States Constitutions.⁴¹¹ On appeal to the Eleventh Circuit Federal Court of Appeals,⁴¹² the plaintiffs challenged the trial court's rulings,⁴¹³ and, specifically contended that the statutory cap violated the Equal Protection Clause of the Fourteenth Amendment.⁴¹⁴ The Eleventh Circuit affirmed application of the Florida damages cap,⁴¹⁵ but granted a motion to certify four questions to the Florida Supreme Court, including the question of whether the cap violated equal protection.⁴¹⁶ The Florida Supreme 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

⁴⁰⁵ 134 So.3d 894 (Fla. 2014).

⁴⁰⁶ *Id.* at 903.

⁴⁰⁷ *Id.* at 898-899.

⁴⁰⁸ Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) (2008).

⁴⁰⁹ *Estate of McCall*, 134 So.3d at 899.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

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.”⁴¹⁷

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 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 medial 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 for each of these reasons, the cap on wrongful death noneconomic damages in medical malpractice actions does not pass constitutional muster.⁴¹⁸

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. Concluding Observations on State Restraint

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.⁴¹⁹

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.⁴²⁰ The National Commission unanimously reported that

⁴¹⁷ *Id.* at 903 (citation omitted).

⁴¹⁸ *Id.* at 914-15 (internal citation omitted).

⁴¹⁹ See *infra* note 423.

⁴²⁰ The commission was established in Section 27 of the newly enacted Occupational Safety and Health Act of 1970. John F. Burton, Jr., *The National Commission on State Workmen’s Compensation Laws: Some Reflections by the Former Chairman*, 40 IAIABC J. 15, 15-16 (2003).

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.⁴²¹

During the course of the following decade:

[M]ost 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.⁴²²

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.⁴²³ 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. . . ."⁴²⁴ In addition to imposing procedural restraints on states in connection with deprivations of

⁴²¹ Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 684 (1998).

⁴²² *Id.*

⁴²³ David B. Torrey, *The Federalization/Federal Standards Issue: A Short History Before and After NFIB v. Sebelius* (U.S. 2012), 6 ABA WORKERS' COMP. SECTIONS 2013 MIDWINTER SEMINAR AND CONFERENCE (2013), citing MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL Insurance 86 (1999).

⁴²⁴ U.S. CONST. amend. XIV, § 1.

life, liberty, or property,⁴²⁵ the Supreme Court has established that the clause may apply to the substance of state law touching various rights.⁴²⁶ The perennial question has been, which state rights are delimited by the clause?⁴²⁷ And, the Court has vacillated between a narrow and broader vision of the scope of the clause.⁴²⁸ In present day, the Court seems to have settled upon an historical “rooting” of the clause’s meaning and application.⁴²⁹

This Part 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. Subpart B. will proceed to discuss the implications of a still viable federal *quid pro quo* theory. Subpart C. will then juxtapose *quid pro quo* with “historical” due process analysis.⁴³⁰ Subpart D. concludes 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.

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.⁴³¹ However, in *Duke Power Co.*,⁴³² decided in 1978, the nuclear power industry persuaded Congress to place a cap on damages resulting from any future catastrophic nuclear accident in the amount of 560 million dollars per incident.⁴³³ Of the number of challenges that the plaintiffs in *Duke Power* made to the cap, they argued that such a limitation of liability violated federal substantive due process.⁴³⁴ The Supreme Court, in rejecting the due process claim,⁴³⁵ stated, “it is not 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.”⁴³⁶

⁴²⁵ See generally *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

⁴²⁶ See generally *Rochin v. People of Cal.*, 342 U.S. 165, 175-76 (1952).

⁴²⁷ Steven G. Calabresi, *Substantive Due Process after Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531 (2008).

⁴²⁸ *Id.* at 1518.

⁴²⁹ *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).

⁴³⁰ See *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

⁴³¹ See *supra* Part IV. B.

⁴³² 438 U.S. 59 (1978).

⁴³³

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” 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.

Id. at 64-65.

⁴³⁴ *Id.* at 82-93.

⁴³⁵ *Id.* at 87-91.

⁴³⁶ *Id.* at 88.

Duke Power involved preemption of state law by federal atomic power policy where the risk of injury was remote.⁴³⁷ It was generally understood that, in the event of a catastrophic nuclear incident, victims' losses would ultimately be underwritten by the U.S. Government;⁴³⁸ there was no genuine question of injury benefit elimination.⁴³⁹ The circumstances were unique and distinguishable from a broad, state-law swap of tort for workers' compensation rights and from 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 Act⁴⁴⁰ 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 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.⁴⁴¹

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 difficult 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 following *Duke Power*, the Court denied a petition for a writ of certiorari in *Fein v. Permanente Medical Group*, discussed earlier in this Article.⁴⁴² The petition challenged, on federal due process grounds, caps on medical malpractice liability in connection with noneconomic damages.⁴⁴³ As may be recalled, the California Supreme Court specifically rejected the existence of a *quid pro quo* due process theory.⁴⁴⁴ 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,

⁴³⁷ *Id.* at 92-93.

⁴³⁸ *Id.* at 63-64.

⁴³⁹ See *infra* notes 442-48 and accompanying text.

⁴⁴⁰ Price-Anderson Nuclear Industries Indemnity Act (Price-Anderson Act), 42 U.S.C. ch. 23 (1957).

⁴⁴¹ *Duke Power Co.*, 438 U.S. at 93.

⁴⁴² See *supra* notes 362-71 and accompanying text.

⁴⁴³ *Fein v. Permanente Med. Grp.*, 695 P.2d 665, 679 (Cal. 1985).

⁴⁴⁴ *Id.* at 679-81, n. 18.

that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary.⁴⁴⁵

Although it might be argued that the dismissal decided the *quid pro quo* issue,⁴⁴⁶ it does not appear that the Court has thereafter had occasion to address *quid pro quo*; nor has the issue been discussed in the federal court 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, that it 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.⁴⁴⁷ 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 Prince-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.⁴⁴⁸

⁴⁴⁵ *Fein v. Permanente Med. Grp.*, 474 U.S. 892, 894-95 (1985).

⁴⁴⁶ The Court has held that "[S]ummary 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 the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (internal citation omitted). 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).

⁴⁴⁷ *Goldberg*, *supra* note 33, at 613.

⁴⁴⁸ *Duke Power Co.*, 438 U.S. at 93.

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.⁴⁴⁹ There is no requirement that the plans pay any minimum level of benefits.⁴⁵⁰ In Oklahoma, alternative plans are required to pay the same “forms” of benefits as those required under the workers’ compensation statute.⁴⁵¹ The statute requires payment of specified benefits for total disability, for partial disability, and for medical treatment.⁴⁵² In Tennessee, critics allege that the proposed opt-out bill, S.B. 721,⁴⁵³ 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.⁴⁵⁴ No appeal of eligibility determinations is mentioned anywhere in the bill.⁴⁵⁵ Thus, the bill would apparently not confer plan participants with *rights* to contest substantive determinations under an alternative benefit plan.⁴⁵⁶ Additionally, no procedures for dispute resolution are set forth in the bill, and no procedures for selection of claim dispute factfinders are identified.⁴⁵⁷ Unlike the Oklahoma statute,⁴⁵⁸ the Tennessee bill would *not* retain the workers’ compensation exclusive remedy rule,⁴⁵⁹ but the right to recover under Tennessee tort law would apparently be modified under the bill.⁴⁶⁰ No right to sue would exist if the employee “[fails] to follow instructions and rules,” is injured by “hazards that are commonly known and appreciated, or if the injury is caused by “failure to follow available safe alternatives.”⁴⁶¹ 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.⁴⁶²

In a detailed 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 they faced other obstacles to recovering benefits:

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 plan appeared less favorable to employees. Moreover, presumably in an effort to curb tort liability, a very high fraction (about 85

⁴⁴⁹ See Letter to Senator Sherrod Brown (Dep’t of Labor Feb. 24, 2016) (“ERISA does not give the Department [of Labor] the authority to establish adequacy levels for benefits in [opt-out] plans.”) (last accessed July 12, 2016), <https://www.documentcloud.org/documents/2730159-DOL-ERISA-Opt-Out-Letter-022416.html>.

⁴⁵⁰ *Id.*

⁴⁵¹ See OKLA. STAT. ANN. tit. 60-85A, § 203(B).

⁴⁵² See generally Okla. Stat. Ann. tit. 60-85A, §§ 1-125 (West 2015).

⁴⁵³ See *supra* notes 75-76 and accompanying text.

⁴⁵⁴ David B. Torrey, Appendix B: Statement of The American Insurance Association, *supra* note 74, at 36.

⁴⁵⁵ See generally S.B. 721, 190th Gen. Assemb., Reg. Sess. (Tenn. 2015).

⁴⁵⁶ 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. See generally S.B. 721, 190th Gen. Reg. Sess. (Tenn. 2015).

⁴⁵⁷ *Id.*

⁴⁵⁸ See OKLA. STAT. ANN. tit. 60-85A, § 209(A) (West 2015).

⁴⁵⁹ S.B. 721 § 50-10-108, 190th Gen. Assemb., Reg. Sess. (Tenn. 2015).

⁴⁶⁰ Economic damages would apparently be capped at \$1,000,000 per employee. S.B. 721 § 50-10-108(b)(1), 190th Gen. Assemb., Reg. Sess. (Tenn. 2015), <http://www.capitol.tn.gov/Bills/109/Bill/SB0721.pdf> (last accessed July 12, 2016).

⁴⁶¹ S.B. 721 § 50-10-108(c)(4-7), 190th Gen. Assemb., Reg. Sess. (Tenn. 2015), <http://www.capitol.tn.gov/Bills/109/Bill/SB0721.pdf> (last accessed Aug. 12, 2016).

⁴⁶² See DUFF, *supra* note 23, at 6.

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.⁴⁶³

Thus, under the alternative plans analyzed by Professor Morantz, entire classifications of the most seriously injured workers were not eligible for permanent disability benefits and—if they had signed on to an arbitration agreement as a condition of participating in such a plan—could also not pursue a tort claim.⁴⁶⁴ 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 rights⁴⁶⁵ and was historical in at least two senses. First, the swap itself is over a century old⁴⁶⁶ and has, therefore, itself become an important part of history and tradition. Second, the implication behind the bargain is that only a reasonable set of rights could be substituted for a tort-based right to a remedy for personal injury; a right that is difficult not to see through Blackstonian lenses.⁴⁶⁷

In *Washington v. Glucksberg*,⁴⁶⁸ 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 specifically 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.⁴⁶⁹

⁴⁶³ Alison Morantz, *Opting out of Workers' Compensation in Texas: A Survey of Large, Multistate Nonsubscribers, Regulation vs. Litig. Perspectives from Econs. And Law* 197 200 (Daniel P. Kessler ed., 2010). 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 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 expenses until about fifteen years ago, despite operating an opt-out system. Then costs began to descend. *See id.* at 201-02. 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, 123-24 (2001).

⁴⁶⁴ After all, it is the most seriously injured workers who are permanently disabled, and those are the claims explicitly excluded by these alternative plans.

⁴⁶⁵ *See supra* Part II.

⁴⁶⁶ *Id.*

⁴⁶⁷ Goldberg, *supra* note 33, at 545.

⁴⁶⁸ 521 U.S. 702 (1997).

⁴⁶⁹ *Id.* at 720-21 (internal quotation omitted) (internal citations omitted).

In *McDonald v. City of Chicago*,⁴⁷⁰ 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.”⁴⁷¹ Nevertheless, it seems difficult to avoid exploration of the historical dimensions of personal injury remedies in light of *Glucksberg* and its progeny.⁴⁷² The inquiry resembles this article’s state law “right to a remedy” discussion.⁴⁷³ 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:

[T]he 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.⁴⁷⁴

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 has likely suspected that right to a remedy for physical injury was of heightened importance. Whether that sense of importance was 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 Justice Bushrod Washington’s 1823 interpretation of the Privileges and Immunities Clause of Article IV of the Constitution in *Corfield v. Coryell*.⁴⁷⁵ In *Corfield*,⁴⁷⁶ plaintiffs challenged a New Jersey statute forbidding out of state persons from gathering clams and oysters.⁴⁷⁷ Justice Washington rejected the claim that the law ran afoul of the Privileges and Immunities Clause:

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

⁴⁷⁰ 561 U.S. 742 (2010).

⁴⁷¹ *Id.* at 916 (Breyer, J., dissenting).

⁴⁷² See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 92 (2006).

⁴⁷³ See *infra* Part IV. A.

⁴⁷⁴ *Abigail Alliance For Better Access v. Von Eschenbach*, 495 F.3d 695, 722 (D.C. Cir. 207) (en banc) (Rogers, J., dissenting) (citation omitted).

⁴⁷⁵ 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).

⁴⁷⁶ 6 Fed. Cas. 546 (Pa. E.D. 1823).

⁴⁷⁷ *Id.* at 548.

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.⁴⁷⁸

Whether John Bingham, a principal author of the Fourteenth Amendment,⁴⁷⁹ consciously presumed during the drafting of the Amendment that the right to “obtain safety”⁴⁸⁰ was a “privilege and immunity”⁴⁸¹ of citizens is beyond the scope of this discussion.⁴⁸² It nevertheless seems plain enough, historically speaking, that colonists, founders, and republicans would have recognized a right to a remedy for personal injury.⁴⁸³ However, substantive due process runs deeper than history.

In *McDonald*, the Supreme Court struck municipal handgun restrictions, extending *Heller*’s reach to the states.⁴⁸⁴ Although not willing to broaden the cramped view of the Fourteenth Amendment’s Privileges and Immunities Clause (established in the *Slaughterhouse* cases),⁴⁸⁵ Justice Alito ultimately opined that the Fourteenth Amendment incorporated the Second Amendment’s right to bear arms.⁴⁸⁶ His opinion, in many respects, mirrors arguments made in the state courts regarding the historical grounding of tort law and the right to a remedy for physical injury.⁴⁸⁷

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. 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. What is more, state constitutions adopted during the Reconstruction era by former Confederate States included a right to keep and bear arms. 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.⁴⁸⁸

⁴⁷⁸ *Id.* at 551-52.

⁴⁷⁹ Jackson, *supra* note 475, at 589.

⁴⁸⁰ *Id.* at 590.

⁴⁸¹ *Id.* at 589.

⁴⁸² *Id.*

⁴⁸³ See Goldberg, *supra* note 33, at 545, 551.

⁴⁸⁴ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

⁴⁸⁵ *Id.* at 750.

⁴⁸⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008) (striking District of Columbia’s gun restrictions).

⁴⁸⁷ *McDonald*, 561 U.S. at 749-50.

⁴⁸⁸ *Id.* at 758 (citing 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 TEX. L. REV. 7, 50 (2008)). 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 Mont. Const., Art. III, § 13 (1889); Wash. Const., Art. I, § 24 (1889); Wyo. Const., Art. I, § 24 (188). See also *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986).

In response to this familiar historical stratagem—attempting to establish that a right was recognized as fundamental during the enactment of the Fourteenth Amendment and, thus, should be considered fundamental in present times⁴⁸⁹—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.⁴⁹⁰

This is where historical analyses often end. One side (it is unimportant which side) will argue that an important right, though undeniably important, is not sufficiently valued within the text of the Constitution to warrant careful protection.⁴⁹¹ 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.”⁴⁹² 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.⁴⁹³ In the context of the workers’ compensation *quid pro quo*, it is unclear whether 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; however, 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—particularly, for physical injury—is subject to significant modification or eradication on the whim of a legislature. However, workers’ compensation opt-out carries the potential for

⁴⁸⁹ *McDonald*, 561 U.S. at 767-69.

⁴⁹⁰ *Id.* at 875-76 (Stevens, J., dissenting) (internal citations omitted).

⁴⁹¹ *See, e.g.,* *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *rev’d on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

⁴⁹² *Id.* at 325.

⁴⁹³ *See, e.g.,* Justice Kennedy’s opinion in *Lawrence v. Texas*, 539 U.S. 558, 570-72 (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.”)

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:

[I]t 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 for candidates for inclusion.⁴⁹⁴

As Goldberg has further argued, a structural due process theory can provide a framework for connecting areas of private and public law.⁴⁹⁵ 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. Rather, 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:

[U]nderstood 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.⁴⁹⁶

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.

It is evident that our legal tradition does, in fact, value and protect 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 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.⁴⁹⁷ Justice Alito relied on Calabresi and Agudo's work in *McDonald*,⁴⁹⁸ and it is evident

⁴⁹⁴ Goldberg, *supra* note 33, at 625.

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299 (2015).

⁴⁹⁸ *Id.* at 1302.

that the Court has now accepted the existence of unenumerated rights.⁴⁹⁹ 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.⁵⁰⁰ 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 1775,⁵⁰¹ one year prior to the 1776 adoption of the Virginia Declaration of Rights.⁵⁰² The main point of the remarks was that the Fairfax Independent Company should hold annual elections for its militia officers.⁵⁰³ Mason elaborated considerably as follows:

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.⁵⁰⁴

Then, in 1776, Mason submitted his first draft of similar language for the Virginia "Lockean Rights" constitutional guarantee.⁵⁰⁵ 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 pursueing [sic] and obtaining Happiness and Safety.⁵⁰⁶

In each formulation, the right to safety is mentioned.⁵⁰⁷ This seems unsurprising since in 1765 Blackstone discussed "personal security" as first among the "absolute rights" of the English law of that time.⁵⁰⁸

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at 1314.

⁵⁰¹ *Id.*

⁵⁰² *Id.*

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* (citing George Mason, *Remarks on Annual Elections for the Fairfax Independent Company* (Apr. 17-26, 1775), in 1 *The Papers of George Mason, 1725-92* (Robert A Rutland ed., 1970)).

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.* at 1315.

⁵⁰⁷ *Id.* at 1305-06.

⁵⁰⁸ WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 68 (George Chase, 2d ed. 1884).

The purpose of this foray into history is not to say it should be “cited” because it is history, but rather, because it is correct. It is nearly impossible to suppose that any person would consciously enter into a society that denies remedy for physical injury caused by wrongful conduct. While *McDonald* protects one aspect of personal security—physical self-defense through firearms⁵⁰⁹—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.⁵¹⁰ 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 noneconomic 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 significant compromise by workers of economic damages. An entire range of compensatory damages is simply not available as a result of the Grand Bargain. A century ago, workers had already completely surrendered noneconomic damages. Many states struggle politically over the adequacy of benefits provided to injured workers. As

⁵⁰⁹ *McDonald v. City of Chicago*, 561 U.S. 742, 767-68 (2010).

⁵¹⁰ 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, 357-58 (2001).

with 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.”⁵¹¹ 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 ruble 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.

⁵¹¹ New York C. R. Co. v. White, 243 U.S. 188, 201 (1912).