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Reverberations of Magna Carta – Work Injuries, Inkblots, and Restitution

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Reverberations of Magna Carta: Work Injuries, Inkblots, and Restitution

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I. INTRODUCTION

This article takes the position that workers in the United States have been unconstitutionally undercompensated for their work injuries for at least a century; and that they should keep this very important reality in the forefront of their collective purpose when struggling for better injury compensation and safer working conditions. As the article will explain, workers' compensation, the current state-based system by which American workers receive compensation for work-related injury and death, was obtained from legislatures as a trade—a "Grand Bargain"[1]—for surrendering their "lawsuit rights" against employers. If the bargain has been breached—and the article contends it has[2]—an "exit clause,"[3] even if not concretely cognizable at law because of the "contract's" breadth, should be aggressively sought in spirit by workers in a "New Bargain"[4] on workplace safety and remedies for workplace injury and death. Alternatively conceived, workers should seek restitution for the unjust enrichment of employers en masse.[5]

It is easy to recoil from the idea that a worker injured on the job will become destitute by the incident. Yet the situation now obtaining in many American states is in some ways even worse than frank acknowledgement that destitution is likely. Rather, one cannot say what will become of the injured worker.[6] This is so because, whereas in the past it could be stated with some degree of confidence that a permanently, totally disabled worker would receive fifty to sixty-five percent of her preinjury wage for the rest of her working life, if injured because of and while at work, this is no longer true in several states.[7] For example, in Kansas a worker who becomes totally disabled

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[1] Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS UNIVERSITY L. REV. 891 (2017).

[2] *See generally* Michael C. Duff, *Fifty More Years Of Ineffable Quo? Workers' Compensation and the Right to Personal Security*, 111 KY. L.J. 1 (2023).

[3] *See* Oren Bar-Gill and Omri Ben-Shahar, *Exit from Contract*, 6 JOURNAL OF LEGAL ANALYSIS 151 (discussing restrictions on exit from consumer contracts) *available at* https://academic.oup.com/jla/article/6/1/151/2937230.

[4] Labor was split on the bona fides of workers' compensation during the decade it was conceived. Alan Derickson, *Health Security for All? Social Unionism and Universal Health Insurance, 1935-1958*, 80 J. OF AM. HISTORY, 133, 1337 (1994): "Samuel Gompers [the central figure of the labor movement in the early 20th century] denounced compulsory insurance in the 1910s. Not merely obstructive of progress, Gompers and other conservatives believed in workers' self-help through insurance programs financed solely by union dues and assessments." Consequently, it is very problematic to argue that the original Grand Bargain was actually negotiated by a unitary, organized, labor movement. A new bargain would have the potential for being more orderly than the old one.

[5] Black's Law Dictionary defines restitution as "[a] body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment." BLACKS'S LAW DICTIONARY (12th ed. 2024).

[6] Michael Dworsky & David Powell, *The Long-Term Effects of Workplace Injury on Labor Market Outcomes: Evidence from California* (NBER/SSA Draft 2022) (emphasizing the limited understanding of the long-term economic effects of workplace injuries in the U.S. economy).

[7] LEX LARSON, LARSON'S WORKERS' COMPENSATION LAW § 80.01 et seq., Matthew Bender & Company, Inc. (2023).

from working because of a work-related injury is entitled to a lifetime maximum payout of $155,000.[8] So, if an 18-year old worker becomes totally disabled for life as a result of a work injury, Kansas workers' compensation will pay a mere $3,163.27 per year in benefits assuming a work career of 49 years.[9] For some people the hard edge of this shocking number is cushioned by wrongly assuming that "welfare" or "social security" will necessarily fend off poverty.[10] But workers' compensation as originally conceived was supposed to be an "adequate" substitute for a compensatory negligence lawsuit;[11] and throwing a worker into destitution, even if injured by a negligent employer,[12] is not consistent with notions of law or equity.[13]

Furthermore, although partially disabled workers were originally, in the early 20th century, entitled to a weekly benefit based on a percentage of the amount of wages lost as a result of a work injury,[14] or on some estimate of the reduction of an injured worker's earning capacity after the injury, for the full duration of the injury, this right is no longer recognized in most states.[15] Instead, partially disabled workers are compensated under arbitrary benefit "schedules" bearing no articulated relationship to wages lost, or even to an explicit projected loss of earning capacity.[16] So, for example, in many situations a worker who suffers loss of a body part (say a shoulder) is provided with a certain number of weeks of benefits (say 222).[17] There is virtually no explanation attempted by any state of just how "222 weeks for an impaired shoulder" was agreed upon as a proxy for an injured worker's wage loss or earning capacity. Parroting that "222" is a certain

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[8] Gabrielle A. Stein**,** *Adding Insult To Injury: How Kansas's $155,000 Cap On Permanent Total Disability Benefits Sets Up Injured Kansas Workers For A Lifetime of Hardship*, 62 WASHBURN L.J. 383 (2023) (explaining the current Kansas workers' compensation structure).

[9] A worker who goes to work at 18 and retires at 67 works for 49 years. $155 divided by 49 years equals $3,163.27.

[10] In many instances workers' compensation may be reduced by receipt of other benefits—but any way you slice it this is a tale of destitution. *See* HOW WORKERS' COMPENSATION AND OTHER DISABILITY PAYMENTS MAY AFFECT YOUR BENEFITS, SOCIAL SECURITY ADMINISTRATION *available at* https://www.ssa.gov/pubs/EN-05-10018.pdf.

[11] New York Cent. R. Co. v. White*,* 243 U.S. 188 (1917) (assuming but not deciding that the workers' compensation system was adequate).

[12] Leaving workers' compensation to one side, "an employer is subject to liability for harm caused to an employee by failing: (a) to provide a reasonably safe workplace, including reasonably safe equipment; or (b) to warn of the risk of dangerous working conditions that the employer, but not the harmed employee, knew or should have known." RESTATEMENT OF EMPLOYMENT LAW § 4.05 (2024).

[13] RESTATEMENT OF EMPLOYMENT LAW § 4.02 (2024) (discussing liability for tort law violations); NATE HOLDREN, INJURY IMPOVERISHED (2020) (discussing normative theories in criticizing workers' compensation systems).

[14] BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., NO. 203, 91-92, WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES AND FOREIGN COUNTRIES (1917) *see* Duff, *Fifty More Years Of Ineffable Quo? Workers' Compensation and the Right to Personal Security*, *supra*. n.2, at 21 (explaining original partial disability statutory structure in American workers' compensation law).

[15] Several states cut off "total incapacity" workers' compensation benefits after an arbitrary passage of time. *See* e.g., Wyoming (80 months) and Indiana (five hundred weeks). JUSTIA, WORKERS' COMPENSATION LAWS: 50 STATE SURVEY (2022) https://www.justia.com/workers-compensation/workers-compensation-laws-50-state-survey/.

[16] The process was well underway by 1980—after the pressure to federalize workers' compensation had subsided—and the leading workers' compensation of the era noted with alarm the break with traditional workers' compensation theory. Arthur Larson, *The Wage Loss Principle in Workers' Compensation*, 6 WILLIAM MITCHELL L. REV. 501, 502 (1980) ("Over the years, in a number of jurisdictions, this [wage loss] function has imperceptibly given way to a process of paying cash for physical impairment as such, regardless of either actual or presumed loss of earning capacity, and often in a lump sum, until in some states this cash-for injury operation has come to predominate both as to the costs entailed and as to the administrative and legal time consumed. This in turn has recently generated a strong reaction among those who view this trend as an unfortunate and expensive distortion of the real mission of workers' compensation.").

[17] *See* R.S. Mo. 287190.1; LEX LARSON, LARSON'S WORKERS' COMPENSATION LAW § 80.05, *supra*. n.7. ("It has often been observed that the origins of the 'schedule' seem to have been lost in the mists of history.")

percentage of 400-weeks for loss of "body as a whole" does not help if the number "400" is also not adequately explained – as it is not.[18] And there is simply no national tracking system to determine what ultimately becomes of injured workers trapped in this ancient and arcane system.[19]

So what? Many may meet this claim—as bad as it sounds for workers from a distance—with a sense of fatalism. Accidents will happen.[20] Some observers describe workers' compensation as an employee's cap-in-hand injury "benefit"—forgetting that it stems from an underlying tort right to a remedy—which depends for its existence on a state's rational, but discretionary, conception of good policy.[21] That policy, in turn, may be grounded in a state's hope of "good" private corporate citizenship surrounding the occurrence of "accidents," a hope relying ultimately on moral suasion, divorced from a tort right.[22] Businesses, some have also hoped, will not resist "reasonable" state efforts to require employers to continue putatively adequate, but in reality weak, injury remedies.[23] Coercion of employers to compel workplace safety, continuing this line of thinking, should be minimal—because all that transpires in an injury is an unfortunate accident.[24]

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[18] For example, in Missouri "[t]he legislature has assigned a total of 400 what is referred to as weeks or units to the entire body and from there assigns a portion of the total weeks or units to different parts of the body." MISSOURI DEPARTMENT OF LABOR & INDUSTRIAL RELATIONS, SETTLING A CASE *available at* https://labor.mo.gov/dwc/injured-workers/settling case#:~:text=The%20legislature%20has%20assigned%20a,different%20parts%20of%20the%20body. The question is, why?

[19] DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATIONS TO INJURED WORKERS?, UNITED STATES DEPARTMENT OF LABOR 15 (2016) *available at* https://www.dol.gov/sites/dolgov/files/OASP/files/WorkersCompensationSystemReport.pdf There are only a handful of studies attempting to calculate lifetimes earnings losses and they are dated and limited to certain regions of the country.

[20] D.C. Girasek, *Would society pay more attention to injuries if the injury control community paid more attention to risk communication science*?, 12 INJ. PREV. 71 (2006) *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2564451/ (explaining difficulty of getting society to proactively react to the ubiquity of injuries).

[21] That reasoning undergirds the use of rational basis review by courts when it is alleged that legislative change is harmful to workers and therefore unconstitutional. For discussion of the evolution of police power rationality review *see* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1640-41 (2016) (explaining that heightened scrutiny of legislative action is employed only where fundamental classifications or fundamental rights are at issue). I argue here that deprivation of injury rights should be subjected to heightened judicial scrutiny in the same manner as tort. 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, 529 (2005) (arguing for intermediate scrutiny by courts of serious legislative interference with tort law).

[22] *See* Leslie L Boden & Monica Galizzi, *Blinded By Moral Hazard*, 60 RUTGERS UNIVERSITY L. REV. 1213, 1216 (2017) (observing that *economists* assume employers will act in accord solely with economic incentive and that no state compulsion apart from market efficiency is required to operate workers' compensation).

[23] *See* Michael C. Duff, *Fifty More Years of Ineffable Quo? Workers' Compensation and the Right to Personal Security,* 111 KENTUCKY L. J. 1 (2023) (discussing in detail the watering down of workers' compensation benefits in relation to true compensatory tort damages).

[24] In 2012, the Oklahoma legislature attempted to make workers' compensation voluntary even while forbidding employee tort actions for workplace injury, but the courts eventually rebuffed the attempt on state constitutional grounds. Vasquez v. Dillard's, Inc., 2016 OK 89 (2016) (overturned on state constitutional "special laws" grounds).

But assuming that all work injury is "accidental" puts the cart factually before the horse.[25] Work harming workers is no accident.[26] All industry foreseeably harms workers.[27] The only unknown fact is which particular employer, or industry, will harm which particular employee.[28] Workers' compensation, in effect, creates an irrebuttable presumption that under bi-lateral (one plaintiff-one defendant) analysis particular employers are not negligent as a matter of law in connection particular work injuries. Scrutiny of that presumption unavoidably generates legal-conceptual problems. In Anglo-American law (and elsewhere), it has long been acknowledged that a perpetrator is required to compensate another for injuries wrongfully caused.[29] Workers' compensation is based on principles of enterprise liability deliberately created outside of the bi-lateral (perpetrator-victim) context—it accepts the notion that the costs of "accidental" but foreseeable harm should be borne in the aggregate by the industry responsible for their infliction.[30] When workers' compensation enterprise liability diminishes benefits to the vanishing point,[31] dyadic, bi-lateral notions of justice naturally reemerge.

This article assumes a worker's right to be free from wrongful harm—and the separate right to seek a remedy for vindication of the original right—to be fundamental and constitutional.[32] More importantly, the article anticipates that workers will view that right as fundamental in

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[25] *See* Gregory Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1286 (2001) ("Fault liability pins the costs of the nonnegligent accidents that are the long-run price of an activity's presence in the world on the random victims of the activity. Enterprise liability pins those accident costs on the activity--the enterprise--which imposed the nonnegligent risks responsible for the injuries at issue.")

[26] Indeed the entire idea of workers' compensation is that injury is a "characteristic activity" of industry. *See id.* at 1286.

[27] Increasingly, industry is discovering that workplace accidents are a function of organizational management and have pioneered the creation of:

> [A] high-reliability safety culture, which has been defined as "professional leadership attitudes in a High Reliability Organization that manage potentially hazardous activities to maintain risk to people and the environment as low as reasonably achievable, thereby assuring stakeholder trust." These institutions are trying to move from addressing each individual adverse event and type of adverse event to addressing safety systematically within an integrated management system for safety. VEAZIE S, PETERSON K, BOURNE D. EVIDENCE BRIEF: IMPLEMENTATION OF HIGH RELIABILITY ORGANIZATION PRINCIPLES. WASHINGTON (DC): DEPARTMENT OF VETERANS AFFAIRS (US); 2019 May. *available from*: https://www.ncbi.nlm.nih.gov/books/NBK542883/

[28] The health care industry, for example, provoked by the Institute of Medicine report *To Err is Human*, introduced the idea of developing hospitals into high-reliability organizations after coming to the widespread conclusion that "accidents" were frequently a function of failing management. David W. Bates and Hardeep Singh, *Two Decades Since To Err Is Human: An Assessment Of Progress And Emerging Priorities In Patient Safety*, 37 HEALTH AFFAIRS 1736 (2018) *available at* https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2018.0738.

[29] 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.").

[30] *See supra*. n.25 and accompanying text. *See also* GREGORY C. KEATING, ENTERPRISE LIABILITY: COLLECTIVE RESPONSIBILITY AND COMMUTATIVE JUSTICE *in* REASONABLENESS AND RISK (2022).

[31] See Emily A. Spieler and John F. Burton, Jr., *The lack of correspondence between work-related disability and receipt of workers' compensation benefits*, 55 AM. J. IND. MED. 487 (2012).

[32] Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline For The Interpretation Of Unenumerated Rights*, 62 Oklahoma L. Rev. 167, 207 (2010) (explaining that for the founders of the United States unenumerated rights corresponded to English law as propounded in Blackstone's Commentaries, especially absolute rights including the right to personal security).

attempting to gain restitution in connection with extraction of an ongoing economic rent.[33] All has seemed well with the status quo provided the "enterprise liability" principle is taken seriously; but the reality of destitution upsets the apple cart; and provokes (and should provoke) workers to reflect upon their lost tort right—their "Magna Carta" right[34]—to a cause of action for a wrong perpetrated on their persons.[35]

The article proceeds as follows. Part II discusses workers' compensation context necessary for grasping the ensuing constitutional claim that a historical state "taking" of workers' injury rights and remedies (and derivatively workers' safety) has occurred. Part III analyzes the recent phenomenon of statutory innovations protecting workers on the job from occupational disease, despite the preceding (the article argues illegitimate) race of the law "to the bottom" and away from coverage of such harm. Firefighter cancer and Covid-era causation presumptions are prime examples in this category of legislation.[36] In each case, advocates for injured workers (and workers themselves) have successfully been arguing to legislatures that work-related diseases probably caused by work should be presumed covered by workers' compensation law.[37] Part IV discusses labor law principles and the potential for work stoppages and collective bargaining to cover the considerable gaps existing in work injury law and workplace safety. Unionized employers are *mandated* to bargain over such issues,[38] and the law of a handful of states authorizes unionized workers and employers to enter into "carve-out" agreements on workplace injury and safety.[39] Even non-union employees have the federal right to concertedly protest unsafe working conditions *outside* the context of Occupational Safety and Health Act.[40]

The time may be right for workers to weave together a seamless web of workplace injury rights in a spirit marshalling a claim of restitution—as if an unenumerated constitutional right to a remedy for workplace injury has always existed, but been improperly denied full legal recognition.

II. WORKERS' COMPENSATION AND THE CONSTITUTIONAL DILEMMA

A. Workers' Compensation Context

Workers' Compensation is the legal quid pro quo for a tort action, and a remedy for a tort wrong runs very deeply in the history of Anglo-American law.[41] Cutting off workers' injury remedies, or rendering them ineffective, or eliminating a state forum for their pursuit, calls into

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[33] *See supra*. n.5.

[34] As interpreted by Lord Coke and eventually "translated" by Blackstone. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline For The Interpretation Of Unenumerated Rights*, *supra*. n.32 at 200-212.

[35] Joshua C. Tate, *Magna Carta and the Definition of Fundamental Rights,* 59 TULSA L. REV. 39, 41-43 (2024) (discussing the increased reference of the U.S. Supreme Court to the Magna Carta, including in the recent *Dobbs* case).

[36] *See infra*. Part III.

[37] *Id*.

[38] Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 222 (1964); NLRB v. Gulf Power Co.,384 F.2d 822, 825 (1967). Employers are not required to agree to any particular proposal but any agreement included in a collective bargaining agreement is enforceable in federal court.

[39] Ellyn Moscowitz & Victor J. Van Bourg, *Carve-Outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements*, 46 SYRACUSE L. REV. 1 (1995).

[40] Labor Board v. Washington Aluminum Co., 370 U.S. 9 (1962). The Occupational Safety and Health Act will be referred to as "OSHA" throughout the article.

[41] *Id. See also* Washington v. Glucksberg, 521 U.S. 702 (1997) (reaffirming that the Due Process Clause specially protects fundamental rights and liberties objectively "deeply rooted in this Nation's history and tradition.").

question on constitutional grounds the original quid pro quo and—more deeply—the broader legal status of injury remedies.[42] "My body is my property," a worker may argue.[43] And—the argument might continue—the state should not divest me of my right to argue before the law that my injury was wrongfully caused by my employer unless it simultaneously provides me with a transparent and adequate substitute for the divestiture of that right. At the very least, the state should have the burden of proving that it did not deprive me of the right without a compelling reason; it must justify its action.[44]

Nevertheless, the question remains—and has been lingering for decades[45]—as to how any litigant can substantively object to claimed rights violations if a state supreme court flatly assumes that common law rights are broadly malleable, or even subject to nullification, at the whim of a state's legislature.[46] Original workers' compensation acts were elective;[47] so, if statutes provided inadequate injury relief, employees could simply have opted out of the statutory remedy and back into common law tort.[48] It is hard to argue that an employee-elective system is not currently possible in the United States. A dual-remedy, workers' compensation/tort liability structure has in fact arisen in the United Kingdom (one of the national historical originators of workers' compensation) and in the Netherlands, with each country rejecting embrace of an "industrial

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[42] Heidi Feldman has called the present era one that features "eliminative tort doctrines" which "sharply reduce the grounds for personal injury claims, burden the injured's ability to prevail in permitted claims, and restrict the recovery available even when such claims succeed." Feldman, Heidi Li, *From Liability Shields to Democratic Theory: What We Need from Tort Theory Now* (2021). *Georgetown Law Faculty Publications and Other Works*. 2422. https://scholarship.law.georgetown.edu/facpub/2422. Workers' compensation fits neatly into this era.

[43] Thomas H. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers*, 20 U. MICH. J. L. REFORM 1055 (1987) (discussing various theories on the valuation of the human body and finding that under no theory is it without articulable value) .

[44] *See* 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 *supra*. n.21 (arguing that courts should subject legislative interference with tort remedies to heightened scrutiny).

[45] By 1972 it was evident that workers' compensation was inadequate and would remain so unless policy makers made a variety of changes or federalized the system. THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972); the changes were never made. *See* Susan V. Hamilton, *Reflections on the National Commission on State Workmen's Compensation Programs: An Interview with John F. Burton, Jr*., LEXISNEXIS (2022) *available at* https://www.lexisnexis.com/community/insights/legal/workers-compensation/b/recent-cases-news-trends-developments/posts/reflections-on-the-national-commission-on-state-workmen-s-compensation-programs-an-interview-with-john-f-burton-jr.

[46] *See* Meech v. Hillhaven West, 776 P.2d 488, 488 (Mont. 1989) (holding that the Montana constitution did not guarantee any fundamental right to any particular cause of action or remedy and that the Legislature had the absolute power to alter or abrogate previously available common law causes of action and constrict liability without practical limitation). For a classic discussion of a sharply contrasting position *see* Smothers v. Gresham Transfer, 332 Or. 83 (Or. 2001) (establishing that workers suffering a cognizable injury caused by work could not be legislatively excluded under the workers' compensation system from receiving damages through operation of a heightened causation standard without offending the remedy provision of the state constitution).

[47] The innovation of mandatory workers' compensation was feared vulnerable to federal constitutional attack until the U.S. Supreme Court's opinion in New York Cent. R. Co. v. White, 243 U.S. 188 (1917), which upheld the state workers' compensation system in the United States against federal constitutional attack.

[48] *See e.g.,* DeMay v. Liberty Foundry Co., 327 Mo. 495, 37 S.W.2d 640 (1931); Grantham v. Denke, 359 S.2d 785 (1978). This was an easy escape for legislatures to provide. It was very unlikely that injured workers would take them up on the offer in the 1910s, given the unfriendliness and lengthy nature of tort procedures. But that is not the point. To not allow the opt-out implicated systemic rights deprivation that, it was feared, would attract the attention of potentially hostile courts.

preference" for the delivery of work-injury benefits.[49] In many ways, the workers' compensation/tort structure in the United States reflects what Alan Twerski has called "a tort world that straddles two centuries."[50] On the one hand, the nineteenth century sought perfectly matching pairs of plaintiffs and defendants. When that solution undercompensated injured workers, workers' compensation inserted broad notions of adequate aggregate compensation on an enterprise liability theory. Resistance to putative excessive workers' compensation contains echoes of what Douglas Kyser has termed defendants' constitutional claim to "individuation" in tort.[51] Although he was referring to tort developments, workers' compensation is also such a compensatory mechanism: a tort-related liability compromise. An individuation claim is closely connected to arguments of inadequacy. A "good" negligence claim is swept up—"deindividuated"—just like a "bad" negligence claim. All tort claims are preempted by workers' compensation's "exclusive remedy rule."[52]

Important observers—including the American federal government—continue to call into question the viability of the current state-based work injury remedial system. As the Department of Labor noted in a 2024 blog post, reacting to the most recent National Academy of Social Insurance statistics showing accelerating declines in employer workers' compensation costs:

> The cost for employers to provide benefits to their workers when injured in their workplace is only 2/3 of what it was 20 years ago. While controlling costs for employers is a legitimate concern, it shouldn't be at the expense of critical protections for workers and their families. In 2015, the Department of Labor highlighted that because of changes to state workers' compensation laws, the system was shouldering a mere 21% of the cost of workplace accidents. Workers, their families, and their private healthcare were bearing 63% of the cost of the injury, while taxpayers (not employers) covered the other 16%. In fact, programs funded by federal taxpayers, including Medicare, Medicaid and Social Security, had likely kicked in around $30 billion to help cover the gap.[53]

But such observations are merely hortatory. If workers' compensation benefits have deteriorated, it is because states have chosen to hobble them. The only real, legal-constitutional question is whether states should be compelled design workers' compensation systems that are adequately compensatory (that is, as a matter of law, even though they are not doing so), assuming

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[49] Gerhard Wagner, *Tort, Social Security, and No-Fault Schemes: Lessons from Real World Experiments*, 23 DUKE J. OF COMP. & INT. L. 1, 34-35 (2012) (explaining that some countries in Europe abandoned the industrial preference afforded under civil law for work-related injuries).

[50] Aaron D. Twerski, *Market Share--A Tale of Two Centuries*, 55 BROOK. L. REV. 869, 882 (1989).

[51] Douglas A. Kysar, *The Constitutional Claim to Individuation in Tort – A Tale of Two Centuries*, Part 2 (October 9, 2023). YALE LAW SCHOOL, PUBLIC LAW RESEARCH PAPER, YALE LAW & ECONOMICS RESEARCH PAPER, Available at SSRN: https://ssrn.com/abstract=4596502.

[52] RICHARD R. CARLSON, MICHAEL C. DUFF, DALLAN F. FLAKE, & RICHARD A. BALES, EMPLOYMENT LAW 385 (2023).

[53] CHRISTOPER J. GODFREY, DIRECTOR , U.S. DEPARTMENT OF LABOR'S OFFICE OF WORKERS' COMPENSATION PROGRAMS, RECORD PROFIT, QUESTIONABLE PROTECTIONS: THE STATE OF WORKERS' COMP, U.S. DEPARTMENT OF LABOR BLOG (March 8, 2024) *available at* https://blog.dol.gov/2024/03/08/record-profit-questionable-protections-the-state-of-workers-comp

that a consensus about what is adequately compensatory could be reached.[54] A premise of this article is that workers should not wait for federal courts to answer this question.

The severe erosion of workers' compensation benefits renders the originating theory of the project suspect, and strikes at the heart of the whole notion of a "substitute" for fault-based injury remedies.[55] The constitutional order should scrutinize such rollbacks on a theory of restitution,[56] but may never do so.[57] It is likely for this reason that workers, organized labor,[58] and broader civil society,[59] have begun to chip away at the shameful edifice of employer insulation from legal responsibility for work injuries.[60] Also for this reason workers and labor organizations can, and should, continue to exert similar modes of pressure.[61] Drawing on the work of economist Mark Blyth, it may be persuasively argued that modern legislative dismantling of the "Grand Bargain" is effectively a reactionary project of attempted elite unwinding of "embedded liberalism."[62] Because of the attempted unwinding of the early twentieth century workers' compensation promise, workers find themselves in a recursive position. Either tort must be reclaimed lock, stock, and barrel (one can think of this as rescission[63]); or workers' compensation as originally conceived as an adequate tort substitute must be re-imagined following restitution.[64] In either case, workers

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[54] HUNT, H. ALLAN, ED. 2004. ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS: A REPORT OF THE STUDY PANEL ON BENEFIT ADEQUACY OF THE WORKERS' COMPENSATION STEERING COMMITTEE, NATIONAL ACADEMY OF SOCIAL INSURANCE. Kalamazoo, MI: W.E. UPJOHN INSTITUTE FOR EMPLOYMENT RESEARCH. https://doi.org/10.17848/9781417596331

[55] *See supra*. n.45. The situation has generally worsened since the 1972 National Commission report. *See also supra*. n.19 (leading to same conclusion of deterioration).

[56] *See supra*. n.33

[57] The Supreme Court may continuously and reflexively apply a constrained analysis to the adequacy of tort substitutes like workers' compensation. Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 88 (1978) (" . . . it is not at all clear that the Due Process Clause, in fact, requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.").

[58] Joe Hernandez, UPS Workers Facing Extreme Heat Win a Deal to Get Air Conditioning in New Trucks, NPR, June 14, 2023 *available at* https://www.npr.org/2023/06/14/1182147381/ups-workers-facing-extreme-heat-win-a-deal-to-get-air-conditioning-in-new-trucks

[59] Barbara Feder Ostrov, *State Laws Favor Benefits for Firefighters With Cancer. Cities and Counties Keep Denying Them*, Mother Jones, March 3, 2023 (noting the increase in state laws facilitating workers' compensation cancer claims by firefighters while acknowledging continuing evidentiary difficulties in winning the claims) *available at* https://www.motherjones.com/environment/2023/03/state-laws-favor-benefits-for-firefighters-with-cancer-cities-and-counties-keep-denying-them/

[60] *See infra*. Parts III & IV.

[61] *See infra*. Part IV.

[62] MARK BLYTH, GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY (2002) (*see also* KARL POLYANI, THE GREAT TRANSFORMATION (1944). Here the original social contract embedded the idea of adequate quasi-compensatory remedies. The counter movement represents unmooring from the original conciliatory project.

[63] Black's Law Dictionary defines rescission as: "The act of rescinding, nullifying, or abrogating a law, decision, agreement, etc." BLACK'S LAW DICTIONARY (12th ed. 2024).

[64] A strong basis for restitution and rescission is that workers' compensation was established when the "unholy trinity" of affirmative defenses—contributory negligence, assumption of the risk, and the fellow servant rule—acted as automatic shutoffs to tort claims and had the effect of making tort actions nearly impossible for workers to maintain. In all but four states the United States those defenses no longer as complete bars to recovery. Thus the entire "Grand Bargain" was mispriced and employers have arguably been wildly unjustly enriched by the arrangement. *See* Florida Workers' Advocates v. State of Florida, Circuit Court, 11th Judicial Circuit in and for Miami-Dade County. General Jurisdiction Division. Case No. 11-13661 CA 25. August 13, 2014 (finding Florida workers' compensation no longer provided an adequate quid pro quo because of erosion of benefits and alteration of employer affirmative defenses) *reversed on other grounds* State v. Florida Workers' Advocates, 167 So.3d 500 (Fla. 2015).

must unilaterally reassert first principles—or "re-embed" them, if one prefers;[65] and the best place to begin is with reassertion of implied (if understated) constitutional ideals.[66] Constitutional protection of injury rights implicates the "ink blot"[67]: inchoate "unenumerated rights,"[68] or "privileges or immunities of citizens"[69] alluded to, but ill-defined, throughout the constitution. Whatever these ideas may mean, they cannot and do not mean nothing.[70]

Accordingly, the next subpart of the article advances a legal argument for the constitutional protection of meaningful injury remedies for tortious harm. Workers and their allies must formulate a legal theory of rights deprivation, and create a new "public meaning" of constitutional rights to remedies.[71] Importantly, though the state may not injure persons directly—and so may not be thought subject to constitutional attack for the negligent injuring conduct of others—the state nevertheless has a constitutional duty to protect its citizens (including workers).[72]

B. MAGNA CARTA QUESTIONS – ARE RIGHTS AND REMEDIES FOR TORTIOUSLY CAUSED INJURIES "UNDER THE INK BLOT"?

In the absence of fundamental law to the contrary, a state legislature might eliminate any injury remedy at any time.[73] One should perhaps not make too much of a counterweight of the old Magna Carta, a symbol of a universal statement of high Anglo-American law. King John would not have signed the document without the threat of a violent baronial uprising and an invasion by Prince Louis and the French navy (probably funded by the Pope) was imminent.[74] The carrying down through the ages of certain high principles is eternally ennobling, but the creation story of

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[65] Michael C. Duff, *Of Courage, Tumult, and the Smash Mouth Truth: A Union-Side Apologia*, 15 EMP. RTS. & EMP. POL'Y J. 521, 524 (2011) (arguing that the labor movement must continually agitate unilaterally from the perspective of an "original position worker" to reinvigorate relevance).

[66] *See generally* Michael Duff, *How the U.S. Supreme Court Deemed the Workers' Compensation Grand Bargain "Adequate" Without Defining Adequacy*, 54 TULSA L. REV. 375 (2019).

[67] *See infra*. at II.A. *See generally* Kurt T. Lash, *Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy*, 80 U. CHI. L. REV. DIALOGUE 219 (2013).

[68] *See* NINTH AMENDMENT OF U.S. CONSTITUTION.

[69] *See* FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

[70] "These words cannot be meaningless, else they would not have been used." United States v. Butler, 297 U.S. 1, 65 (1936) in ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 26 (Surplusage Canon) (2012).

[71] *See* Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 34 (2018) ("When, however, a determinate answer can-not be ascertained through interpretation, judges must enter the construction zone. A rule must be applied—either a previously formulated rule or a new one. We hold that that rule must be informed by the Constitution's original spirit.").

[72] *See infra*. Part II. *But see* DeShaney v. Winnebago Cty. DSS, 489 U.S. 189 (1989) ("But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.").

[73] Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEORGETOWN L. J. 281, 284 (1981) (defining the strong version of legislative supremacy as "an all-encompassing prescription of the judicial role in statutory cases rather than as a mere constraint on judicial behavior. This conception does not merely rule out judicial views on controversial matters of public policy. It also precludes judges from considering relatively noncontroversial policies like stare decisis, judicial administration, or other "legal process" values, unless the enacting legislature has endorsed those values.").

[74] Jessica Brain, *The Forgotten Invasion of England 1216 available at* https://www.historic-uk.com/HistoryUK/HistoryofEngland/Forgotten-Invasion-Of-England-1216/. *See also* Tate, *Magna Carta and the Definition of Fundamental Rights*, *supra*. n.35, at 44 (" . . . the 1215 charter was quickly repudiated by King John and annulled by the Pope.").

the symbolic document is not obviously so.[75] Still, if one were to ask students of the law—even sophisticated students—if principles of tort could (under some high law) simply be discarded by a legislature without constitutional consequence, most would doubt the proposition, but would not quite know why. More sophisticated lawyers might simply ask, "why not?"

But early twentieth century courts implementing workers' compensation seemed similarly to entertain doubts concerning the constitutional status of injury rights: "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,"[76] said one of those courts. While the courts of that era somewhat dismissively concluded that the recently created workers' compensation system was adequate,[77] the more engaging question is why the courts hesitated in upholding the workers' compensation system.[78] Were they addressing the ink blot?[79] The purpose of the following historical discussion is to persuade workers (most importantly) that injury remedies are protected by the U.S. Constitution against unreasonable legislative encroachment.

1. The Ink Blot

The ink blot metaphor derived from an event in the 1980s involving unsuccessful Supreme Court nominee, Robert Bork.[80] "When asked for his view of the ninth amendment during the hearings, Bork said the amendment was like an inkblot covering an enumeration of specific rights. He said he could not decide cases under the amendment without knowing what was under the inkblot."[81]

When courts and legislatures arbitrarily and seriously interfere with workers' rights to a tort-like remedy for injury they implicitly inform the workers that they consider those rights unprotected by the constitution (and therefore not under the ink blot). To state the obvious, there are no explicit references to workers' rights in the federal constitution. One question, though, is whether that constitution somehow provides "unenumerated" injury rights to workers derivatively as "citizens" or "persons." A second question is whether states may compel workers to surrender those rights, if they have in fact been constitutionally conferred.

No one doubts the existence of "unenumerated rights" in the constitution.[82] Whether those rights—whatever they may be—are enforceable against the states is, of course, a different matter.[83] With respect to the existence of unenumerated rights, the ninth amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others

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[75] Tate, *Magna Carta*, *supra*. n.35 at 46-47 (explaining the near-universal conflation of several provisions of Magna Carta and its effective reissuance on several occasions, especially by Lord Coke's "Institutes of the Lawes of England" in the mid-17th century).

[76] New York Cent. R. Co. v. White, 243 U.S. 188 (1917).

[77] Duff, *How the U.S. Supreme Court Deemed the Workers' Compensation Grand Bargain "Adequate" Without Defining Adequacy*, *supra*. n.66.

[78] *Id*.

[79] *See infra*. n.85 and accompanying text.

[80] *Id*.

[81] *Id*. at 71 *citing* a news account at Wall St. J., Oct. 5, 1987, at 22, col. 2.

[82] Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1, 2 (2006) ("The evidence of original meaning that has been uncovered in the past twenty years confirms the first impression of untutored readers of the Ninth Amendment and undercuts the purportedly more sophisticated reading that renders it meaningless.").

[83] Lash, *Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy*, at 221.

retained by the people."[84] What are those "others" retained by the people? According to Sotirios Barber, "[t]he ninth amendment expresses and symbolizes a constitutionalism premised on the belief that the political aspirations of humanity are defined by transcultural or real standards of political morality, like simple justice as opposed to particular or popular historical understandings of justice."[85] That sounds elegant but, more importantly for present purposes, it sounds like something a union organizer might persuasively argue to workers when asserting the idea that adequate workers' compensation benefits—or perhaps adequate remedies for injury—are cognizable as "a right" that governments may not interfere with unreasonably.[86]

The Privileges or Immunities Clause offers another example of constitutional echoes of a deliberately constructed ink blot zone of unenumerated rights—but this time rights that might theoretically be invoked against states.[87] Section 1 of the fourteenth amendment reads in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[88] The clause may be doing new work. Some federal judges—including some U.S. Supreme Court justices—reject the idea of substantive due process.[89] The rejection creates problems for those who contend that state governments are bound by the federal bill of rights[90]—the right of individuals to bear arms (under the second amendment),[91] for example; or the prohibition of a state (like Indiana) from improperly seizing a $42,000 Land Rover as part of a civil forfeiture remedy (arguably implicating the eighth amendment's guarantee of freedom from excessively harsh punishment by the government).[92] Privileges or Immunities arguments essentially claim that certain "rights" are sufficiently important that they must be protected by the federal constitution, regardless how one feels about substantive due process. In other words, if substantive due process will not accurately characterize state overreach, another provision must do the work.[93]

There is a long history of cabining the Privileges *or* Immunities clause of the fourteenth amendment within interpretations of what the Privileges *and* Immunities clause of Article IV of

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[84] U.S. Const. amend. IX.
[85] Sotirios A. Barber, *The Ninth Amendment: Inkblot or Another Hard Nut to Crack?,* 64 CHI.-KENT L. REV. 67 (1988).
[86] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi ("Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.").
[87] Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 JOURNAL OF CONSTITUTIONAL LAW 1295, 1300-1302 (2009) (discussing the privileges or immunities clause as part of the Bork "ink blot" phenomenon).
[88] FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION, SECTION 1 (emphasis supplied).
[89] McDonald v. Chicago, 561 U.S. 742, 805 (2010) (finding Second Amendment applies to states through Fourteenth Amendment substantive due process) (Thomas, J., concurring on privileges or immunities grounds).
[90] *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986) (defending position that framers of the Fourteenth Amendment meant to incorporate Bill of Rights guarantees thereby regulating state action).
[91] *Id*.
[92] Timbs v. Indiana, 139 S. Ct. 682 (2019) (Gorsuch, J, and Thomas, J, concurring); *see also* Note, Timbs v. Indiana, 133 HARV. L. REV. 342 (2019) *available at* https://harvardlawreview.org/2019/11/timbs-v-indiana/.
[93] William J. Aceves, *A Distinction with a Difference: Rights, Privileges, and the Fourteenth Amendment*, 98 TEX. L. REV. 1 (2024) (recognizing and emphasizing the development but arguing it would lead to a *diminished* number of fundamental rights recognized by the courts) *available at* https://texaslawreview.org/wp-content/uploads/2019/09/Aceves-TLRO-V98-1.pdf

the constitution[94] probably means.[95] The Article IV clause is probably a "comity" provision that means only that a state cannot provide in-state rights to out of state citizens of the United States inferior to those it provides to its own residents.[96] The *Slaughterhouse Cases*[97] had employed that meaning in the nineteenth century to render the Privileges or Immunities clause virtually a dead letter. Modern scholars, and Justices Thomas and Gorsuch, may have revived it.[98]

What is driving the revival? The 39th Congress[99] almost certainly had as its collective purpose more than abstractly restraining governments of the defeated confederate states for inchoate future acts.[100] A large part of the congressional objective was to concretely and affirmatively protect contemporaneously the civil rights of former slaves and white Unionists.[101] This was first accomplished through enactment of the Civil Rights Act of 1866, a statute passed over the veto of President Andrew Johnson, who thought the Act exceeded Congress's authority under the thirteenth amendment.[102] The law broadly declared that it was "[a]n Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication."[103] John Bingham, a principal drafter of the fourteenth amendment, believed the *amendment* was necessary to ground the *statute*.[104] Congress provided under the 1866 act that,

> . . . all persons born in the United States . . . excluding Indians not taxed, are hereby declared to be citizens of the United States; and . . . without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be

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[94] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." ART. IV. SEC. 2 OF UNITED STATES CONSTITUTION.

[95] *See* Magliocca, *Rediscovering Corfield v. Coryell*, 95 NOTRE DAME L. REV. 701 (2019).

[96] *Id*. at 710 (observing that one interpretation of decisions construing the privileges and immunities clause of Article IV in the 18th century was that the clause merely prevented states from denying rights to out-of-state national citizens voluntarily granted to state citizens – in other words, it was an anti-discrimination provision).

[97] 83 U.S. 36 (1872) (holding that court application of the Privileges or Immunities Clause of the Fourteenth Amendment should be limited to federal citizenship rather than extended to state citizenship).

[98] Will Baude, *The Original Meaning of the Privileges or Immunities Clause*, REASON, (2023) *available at* https://reason.com/volokh/2023/10/20/the-original-meaning-of-the-privileges-or-immunities-clause/

[99] 1865-1867.

[100] The confederate states were excluded from participation in the Congress. ZINN EDUCATION PROJECT, DEC. 4, 1865: EX-CONFEDERATE STATES BLOCKED FROM JOINING 39TH CONGRESS *available at* https://www.zinnedproject.org/news/tdih/confederates-blocked-from-congress/#:~:text=The%20makeup%20of%20the%2039th,a%20Joint%20Committee%20on%20Reconstruction.

[101] Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARVARD J. L. & PUB. POLICY *supra*. 6, n.26 *citing* Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069, 1084 (2017) ("[A]fter the Civil War, the Southern States were systematically denying civil rights to former slaves."); *see also* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 99-100 (2016) (discussing post-Civil War violence against and murders of Texan Black persons and White Republicans that went unpunished).

[102] CONG. GLOBE, 39th Cong., 1st Sess. 1679-81 (1866) (veto message of President Johnson); see also Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEORGETOWN L. J. 1389 (2018).

[103] *See infra*. n.105

[104] *Id*. at 1429.

> subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[105]

The Privileges or Immunities clause of the fourteenth amendment was meant, in part, to constitutionalize the substantive rights conferred by the act:[106] "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and to do so "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[107] But the Privileges or Immunities Clause went further than the act.[108]

Michigan Senator Jacob Howard sponsored the fourteenth amendment in the Senate.[109] In his introductory speech Howard said the Privileges or Immunities clause was "very important" and established that United States citizens were entitled to certain "fundamental guarantees" including "protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."[110] Howard then said, "[t]o these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied (sic) and secured by the first eight amendments of the Constitution . . . ."[111]

Many workers might find it hard to accept that rights guaranteeing workplace safety and adequate compensation in the event of tortious injury were left off this list (under another kind of inkblot). They might claim "protection by the Government" and the right to pursue "safety" as fitting comfortably within the clause. The better view is that they would be right. As Thomas Eaton and Michael Wells have explained:

> The framers of the fourteenth amendment and section 1983 were not so much captains of industry enamored by free market capitalism as idealistic abolitionists who had fought slavery for thirty years. The statute was originally known as the Ku Klux Klan Act, because it was inspired by Klan violence against blacks and their white supporters. In order to justify creating a new federal remedy for constitutional wrongs, its supporters had to rebut the argument that it was an unnecessary incursion on state authority because local law enforcement officers could maintain law and order. Their response was to produce evidence of Klan terrorism that had elicited no response from local sheriffs. Thus, the statute "was aimed at least as much at the abdication of law enforcement responsibilities by Southern officials as it was at the Klan's outrages."[112]

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[105] CIVIL RIGHTS ACT OF 1866, Sec. 1, *available at* https://loveman.sdsu.edu/docs/1866FirstCivilRightsAct.pdf.
[106] Barnett, *Three Keys to the Original Meaning of the Privileges or Immunities Clause*, 43 HARVARD J. L. & PUB. POLICY 4 (explaining that constitutionalizing the provisions of the 1866 Civil Rights Act as one of the three great conceptual keys to understanding the original meaning of the Privileges or Immunities clause).
[107] *Id*. at 4-5.
[108] *Id*.
[109] *Id*. at 6.
[110] *Id*. at 7 (quoting Howard's speech at CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866)).
[111] *Id*. at 8 (quoting Howard's speech).
[112] Thomas A. Eaton and Michael Wells, *Government Inaction as a Constitutional Tort: Deshaney and Its Aftermath*, 66 WASH. L. REV. 107, 119 (1991).

It is unpersuasive to argue that the fourteenth amendment had nothing to say about structural federal protection of the substantive rights of state citizens. On the contrary, the evidence shows that the amendment was meant to protect a variety of such rights from state interference—including "abdication from responsibilities."[113] It might be reasonable to argue that the amendment was meant exclusively to protect citizens—where it was meant to "protect" at all—from private violent activity, but that is not what the Civil Rights Act, or statements of congressional sponsors, suggests.[114]

2. A State's Duty to Protect?

Given what important constitutional architects like Jacob Howard said about the protective policy of the privileges or immunity clause, it seems odd to think a state has no constitutional duty to protect the exercise of, or the structure of the exercise of, well-established common law rights. Current constitutional doctrine holds, of course, that state law is afforded great discretion by federal courts, and that states may regulate as they like unless the United States constitution (explicitly or implicitly) says otherwise.[115] Workers' compensation analytical problems emerge when a state attempts to significantly, detrimentally alter or deprive a person of a workers' compensation right (or refuses to protectively declare the existence of such a right) that is not explicitly protected in the U.S. constitution.[116] Workers' compensation, and worker remedies for injury generally are not, as has been said, explicitly protected by the constitution.[117] Some rights, though, seem obviously to exist, regardless what the fourteenth amendment fails to say explicitly about them. The mere existence of complex fourteenth amendment law shows that deprivation of those rights seems suspect.[118]

This is all restating the general problem. At an even more profound level, workers' compensation "immunity" calls into question the constitutional duty of a state to protect its citizens *at all*. A conceptual attack on workers' compensation involves questioning immunization of employers from potential tort claims, not necessarily the immunization of the state from such claims. The precise question, therefore, is whether the state, without heightened judicial scrutiny,

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[113] *Id*.

[114] *See supra.* n.105 & n.110 and accompanying text.

[115] U.S. v. Carolene Products, 304 U.S. 144 (1938) (holding that substantive due process applies to "rights enumerated in and derived from the first Eight Amendments to the Constitution, the right to participate in the political process, such as the rights of voting, association, and free speech, and the rights of 'discrete and insular minorities.'")

[116] *See* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that state bans on same-sex marriage and on recognition of same sex marriages, duly performed in other jurisdictions, are unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution).

[117] Just as it does not expressly forbid a state from enacting a same-sex marriage ban. *See* Obergfell v. Hodges, *supra*., 576 U.S. 544, Scalia, J., dissenting ("We have no basis for striking down a practice that is not expressly prohibited by the Fourteenth Amendment's text, and that bears the endorsement of a long tradition of open, widespread, and unchallenged use dating back to the Amendment's ratification. Since there is no doubt whatever that the People never decided to prohibit the limitation of marriage to opposite-sex couples, the public debate over same-sex marriage must be allowed to continue.")

[118] *See* Duncan v. Louisiana, 391 U. S. 145 149 (1968) (including within the Fourteenth Amendment's protection most of the rights enumerated in the U.S. Constitution's Bill of Rights); Eisenstadt v. Baird, 405 U. S. 438, 453 (1972); Griswold v. Connecticut, 381 U. S. 479 486 (1965) (finding same protections afforded to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs).

may deprive a litigant of a judicial forum, and of a substantive body of longstanding traditional law, vindicating injury rights.[119] The question, in other words, is of state inaction.[120]

Leaving to one side the equal protection question of "protection for *whom*,"[121] the Supreme Court once held that the state has no "duty of protection" under the fourteenth amendment in *DeShaney v. Winnebago Cty. DSS*.[122] In *DeShaney*, a young child, a boy, was beaten and permanently injured by his father, with whom the boy lived.[123] State officials received complaints, and had reason to believe, that the boy was being abused.[124] After a series of suspicious events extending for a couple of years after the initial complaints, the then four year old boy "suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. Randy DeShaney [the father] was subsequently tried and convicted of child abuse."[125] The nearly critically and "vegetative" injured boy,[126] through his noncustodial, estranged mother, brought an action under 42 U.S.C. § 1983 against governmental officials alleging that the boy's liberty had been deprived by the state in violation of the fourteenth amendment.[127] The case eventually made its way to the U.S. Supreme Court, and Justice Rehnquist's resulting substantive due process opinion, relevant to the present discussion, said:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text . . . In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.[128]

While the case may be limited to its facts, it has never been overruled by the Supreme Court. *DeShaney*, it might be argued, is of limited impact in the context of workers' compensation

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[119] *See generally* R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 ST. MARY'S L. J. 973, 1011-1014 (2021) (discussing judicial review of unenumerated rights).
[120] *See* Eaton and Wells, *Government Inaction as a Constitutional Tort: Deshaney and Its Aftermath*, 66 Wash. L. Rev. 107, *supra*. n.112.
[121] *See generally* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 141 (discussing "the flaws, confusion, and unanswered questions that inure in the criteria for assessing suspect and nonsuspect classes" and therefore predicting protection under the equal protection clause).
[122] 489 U.S. 189 (1989).
[123] *Id*. at 191.
[124] *Id*.
[125] *Id*. at 193.
[126] Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 8 (1989) (discussing DeShaney).
[127] *Id*.
[128] *Id*. at 200.

challenges premised on overly restrictive limitations of injury remedies, because such challenges are usually brought under *state* constitutions.[129] Yet, several states simply mirror federal constitutional law in important respects,[130] and state judges may reflexively import federal constitutional law into state constitutional law. A state judge may conclude that, because the *DeShaney* principle says the federal government may not compel state government to provide protection from "private violence," under the fourteenth amendment, the state judiciary is under a similar compulsion with respect to state executive government, which is a distinction straying far from *DeShaney*. *DeShaney* is perhaps distinguishable from an attack on a state for failing to protect citizens by eliminating substantive law because the state is "active" in the act of deprivation.[131] This view may approach the ethos of cases like *N.Y. Cent. R. Co. v. White*.[132] Even in 1917, during the age of *Lochner*, after all, the Supreme Court "doubted" state legislatures could constitutionally eliminate tort law.

Could any principle like affording (recently rebellious) states the discretion to eliminate Blackstonian rights—recognized at the Founding[133]—have been hiding in the collective purpose of the 39th Congress when enacting the fourteenth amendment? In *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*,[134] Steven Heyman argued,

> A central purpose of the Fourteenth Amendment and Reconstruction legislation was to establish the right to protection as a part of the federal Constitution and laws, and thus to require the states to protect the fundamental rights of all persons, black as well as white. In establishing a federal right to protection, the Fourteenth Amendment was not creating a new right, but rather incorporating into the Constitution the concept of protection as understood in the classical tradition. The debates in the Thirty-Ninth Congress over the Fourteenth Amendment and the Civil Rights Act of 1866 confirm that the constitutional right to protection was understood to include protection against private violence.[135]

It is difficult to disagree with this assessment given the state of affairs in 1866 and the equality ethos of the Radical Republicans of the era.[136] As commentators have noted, the later

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[129] William J. Brennan, Jr., *State Constitutions and The Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (". . . [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

[130] Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZAGA L. REV. 773 (2010) ("Many state courts also read such state equal protection provisions, as well as other state constitutional equalities, to guarantee no greater protections than are afforded federally.")

[131] DeShaney, *supra*. at 200 ("In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.")

[132] New York Central R. Co. v. White, 243 U.S. 188 (1917); *see supra*. n.11.

[133] *See generally* Jackson, *Blackstone's Ninth Amendment, supra*. n.32.

[134] 41 DUKE L. J. 507 (1991).

[135] *Id*. at 546.

[136] ERIC FONER, THE SECOND FOUNDING 57 (2019) (explaining that although Radical Republicans were not in the majority they exercised great influence and believed that the original constitution already protected many of the rights at issue in the reconstruction period) .

action/inaction dichotomy reflected by cases like *DeShaney* is historically dubious.[137] Unless the entire theory of tort deterrence is jettisoned,[138] a state's dilution of tort remedies through a slow, but deliberate, imposition of inadequate workers' compensation benefits increases the risk of injury.[139] Such dilution is incompatible with any role the fourteenth amendment might have played in policing encroachment on, and protecting established tort rights. A state having "created the danger" of undercompensation ought to be responsible for subsequent harm related to underdeterrence;[140] even if responsibility, in this context, may be logically related to restoring tort remedies. Workers may under the circumstances feel justified in demanding legal remedies in exchange for rights which they purportedly voluntarily surrendered.[141]

3. Constitutional Historicity

Assuming that a state could violate the constitution through inaction, by depriving individuals a body of law like tort (*DeShaney* notwithstanding), how should the challenge be analyzed? Though the U.S. Supreme Court has applied rational basis review to substantive due process challenges—a standard that frequently sounds the death knell for constitutional challenges,[142] it has also said repeatedly that "[a] claimant seeking to maintain a substantive due process claim must demonstrate that the State has deprived him of a right historically and traditionally protected against state interference" and that a right not "deeply rooted in the nation's history" does not qualify as being a protected liberty interest.[143] The idea is that a certain kind of "deeply rooted" right is "incorporated" into the fourteenth amendment's protection against state deprivation of important rights.[144] This raises a level of generality problem for workers' compensation analysis. Workers' compensation rights did not exist at the time of the founding, but tort rights did.[145] Whatever the U.S. Supreme Court may say about the deep-rootedness of tort rights[146]—and the U.S. Supreme Court has never said that states have carte blanche under the U.S.

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[137] *See* Annaliese Brellis, *Rethinking the "No-Duty" Rule: How DeShaney Can Be Reformed to Enable Objective, Coherent Analysis and Protection for More Victims of Crime*, 114 J. CRIM. L. & CRIMINOLOGY 155, 164 (2024).
[138] Andrew Popper, *In Defense of Deterrence*, 75 ALBANY L. REV. 181 (2011).
[139] Id. at
[140] For a review of the state created danger exception to the "no duty" rule of *DeShaney see* Erwin Chemerinsky, *The State Created Danger Exception*, 23 TOURO L. REV. 1 (2007).
[141] Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime*, 50 OHIO STATE L. J. 825, 828 (1989) ("It is not hard to fathom why individual workers have developed such an increased propensity to bring tort suits rather than simply to rely on guaranteed WC benefits. This phenomenon is the product of recent trends that have made WC less valuable and tort liability (especially, though not exclusively, for defective products) much more valuable."). Professor Weiler accurately chronicles the whittling away of workers' compensation during the 1980s: ". . . [A]s the source of funds was shifting away from WC [to public benefits systems], the eventual payoff from WC for more serious and enduring injuries was being seriously eroded. The rigid permanent disability schedules appeared increasingly arbitrary in particular cases, and periodic benefit payments were not regularly adjusted to rising price levels experienced from the late sixties onward." *Id.*
[142] Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable),* 14 GEO. J.L. & PUB. POL'Y 401, 410 (2016).
[143] Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) *quoting* Moore v. East Cleveland, 431 U.S. 494, 502 (1977).
[144] *See supra*. n.41.
[145] Kaczorowski, *The Common Law Background of Nineteenth-Century Tort Law*, *supra*. n.29, at 51 Ohio St. L.J. 1173
[146] *See* Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs supra*. n.21.

Constitution to categorically eliminate tort law[147]—state courts, even in wild fits of tort reform, do not go so far as to eliminate those rights.[148] Workers' compensation is a tort substitute rather than a welfare program. If tort cannot be eliminated under due process, it follows that neither may workers' compensation. It hardly seems necessary to repeat that injury remedies are "deeply rooted in our nation's history," and that workers' compensation is an injured employee's sole injury remedy. To dispossess it should surely trigger constitutional scrutiny. A state legislature should be required, therefore, to rationally defend significant encroachments on workers' compensation.

Workers would likely find the preceding discussion on the constitutional status of injury remedies persuasive. But whether a worker would win or lose an argument with a law professor over these issues is not quite the point. Rather, workers' positions on these matters are weighty in a different way; and a full immersion in historical and constitutional currents places workers in a morally advantageous position when arguing over restitution for undercompensation of work injury and disease; and future negotiation over contractual labor law health and safety improvements. This is the subject of the next two Parts.

III. OCCUPATIONAL DISEASE AND EXTERNALITIES – STATUTORY INNOVATIONS

Up to this point this article has argued that workers have been statutorily undercompensated for work-related injuries and that workers' compensation consistently underperforms.[149] It has also argued that the undercompensation should be of constitutional dimension: that under "the inkblot" workers should have a right to an adequate remedy for injury,[150] and a state has a duty to provide a forum for the vindication of such rights. But the work injury system, implicitly disregarding principles of enterprise liability,[151] fails to adequately compensate work-related injury and death. This undercompensation simultaneously underdeters risky behavior[152] by employers towards their employees. Workers and their unions (and other advocates) may not accept that undercoverage is acceptable because "lawful" and, on the contrary, may be of the opinion that work related harm should be adequately compensated, even if workers' compensation and other legal principles do not seem on the surface to permit coverage. Workers are justified in thinking that they have been subject to a kind of "taking."[153] This is especially true in the case of legal non-coverage of occupational disease.

A. Coverage and Causation of Occupational Disease

It is hard to overstate the extent to which occupational disease is left uncovered by tort and workers' compensation. This type of noncoverage has, it must first be said, the effect of

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[147] Fein v. Permanente Medical Group, 474 U.S. 892, 894-95 (Stevens, J, dissenting) ("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 . . . appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States.").

[148] For a state by state directory of tort reforms *see* Ronen Avraham, *Database of State Tort Law Reforms*, 7.1 regular, (October 27, 2021) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711.

[149] *See supra*. Part II.A.

[150] *See supra*. Part II.B; *see also* Duff, *Fifty More Years Of Ineffable Quo?*, *supra*. n.2 at 8-14 (discussing systemic questions of workers' compensation adequacy).

[151] *See supra.* n.25 and accompanying text.

[152] *See supra*. n.138 and accompanying text.

[153] Gali Racabi, *At Will as Taking*, 133 YALE L. J. 2256, 2289 (2024) ("Takings involve 'benefits received at the expense of another'—not simply the annihilation of property.")

exacerbating inequality.[154] A worker who can prove that work caused a disease is usually limited to the remedies of a state's workers' compensation statute.[155] Workers' compensation law has formally, if not actually, covered occupational disease from its inception.[156] Since the late 1950s, all states have formally covered occupational disease with workers' compensation, either through their workers' compensation statutes, or through standalone occupational disease statutes that formally provide workers' compensation benefits.[157] Many courts have recognized that if occupational disease is not formally covered by workers' compensation, it must necessarily become the viable subject of a tort suit when negligently caused.[158]

In practice, however, workers' compensation seldom covers occupational disease.[159] Moreover, the federal government has been aware of this reality for decades, has recommended changes to state legal doctrine to facilitate coverage, but in the end has done nothing to rectify the situation—effectively shifting the costs of occupational disease away from the industry that probably caused it, and placing those costs on workers or the federal government.[160] The AFL-CIO[161] estimates that in 2022—the most recent year for which data was available as of the writing of this article—5,486 employees were killed on the job in the United States; and 120,000 workers died from (often latent) occupational diseases.[162] The U.S. Bureau of Labor Statistics reports that, in the same year, private industry employers recorded 2.8 million nonfatal workplace injuries and illnesses.[163]

Diseases are difficult to cover under workers' compensation because some disease have a long latency period and proof of causation is therefore often complicated.[164] Workers may not even

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[154] Xiuwen Sue Dong, Xuanwen Wang, Julie A. Largay, and Rosemary Sokas, *Economic consequences of workplace injuries in the United States: Findings from the National Longitudinal Survey of Youth* (NLSY79), 59 AM. JOURNAL OF INDUSTRIAL MEDICINE 106 (2016).

[155] *See* LEX LARSON, LARSON'S WORKERS' COMPENSATION LAW § 80.01 et seq., *supra*. n.7

[156] WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 757-60 (1936).

[157] HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 49-50 (1954).

[158] *See* Tooey v. AK Steel Corp., 81 A.3d 851, 865 (Pa. 2013) (holding that injuries suffered by employees as a result of their contraction of work-related mesothelioma fell outside the relevant statute of limitations and were therefore not covered by the workers' compensation act, a fact *necessarily* allowing the employees a common law action in tort).

[159] J. PAUL LEIGH & JOHN A. ROBINS, OCCUPATIONAL DISEASE AND WORKERS' COMPENSATION: COVERAGE COSTS AND CONSEQUENCES, MILBANK Q. 2004;82(4):689-721. doi: 10.1111/j.0887-378X.2004.00328.x. PMID: 15595947; PMCID: PMC2690178 *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690178/ (estimating "that in 1999, workers' compensation missed roughly 46,000 to 93,000 deaths and $8 billion to $23 billion in medical costs. These deaths and costs represented substantial cost shifting from workers' compensation systems to individual workers, their families, private medical insurance, and taxpayers [through Medicare and Medicaid]); Elinor P. Schroeder, *Legislative and Judicial Responses to the Inadequacy of Compensation for Occupational Disease*, 49 DUKE J. LAW & CONTEMP. PROBS. 151, 157 (1986) ("Although every state includes occupational diseases in its workers' compensation law, restrictive provisions such as statutes of limitations that run from some point other than discovery, recent exposure rules, minimum exposure requirements, and limitations that diseases be 'peculiar to' or 'characteristic of' the workers' occupation and not 'ordinary to life' make recovery for many workers difficult.")

[160] REPORT TO THE PRESIDENT AND THE CONGRESS OF THE POLICY GROUP OF THE INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE 35-36, 38 (1977) (recommending elimination of unrealistic statutes of limitation and requirements of minimum and recent exposure and adoption of presumptions to aid proof of causation).

[161] Hereinafter "The American Federation of Labor and Congress of Industrial Organizations."

[162] DEATH ON THE JOB: THE TOLL OF NEGLECT, 2024, AFL-CIO, April 23, 2024 *available at* https://aflcio.org/reports/dotj-2024. Latent disease fatalities are (incredibly) not formally tracked by government.

[163] EMPLOYER-REPORTED WORKPLACE INJURIES AND ILLNESSES, 2021-2022, November 8, 2023 *available at* https://www.bls.gov/news.release/osh.nr0.htm

[164] Causal variables are obviously complex. "The Bradford Hill criteria include nine viewpoints by which to evaluate human epidemiologic evidence to determine if causation can be deduced: strength, consistency, specificity,

be aware that they have contracted an occupational disease until many decades have elapsed after their initial exposure; they cannot, therefore, effectively provide "notice" of contraction—creating statute of limitations and other timing problems.[165] By the time a worker discovers a disease, they may have been exposed to the same substance on another job, or outside of work altogether. While it may be possible to establish general causation—for example, that asbestos generally causes mesothelioma—it may be difficult to establish whether a particular substance caused a specific individual's disease on a specific occasion.[166]

Richard Pierce has framed the resulting essential question as, "[i]s there evidence that substance A causes injury X that is sufficient to justify taking some action with respect to substance A and those firms who are responsible for substance A?"[167] Professor Pierce has also noted that the question is easier to answer in an administrative or regulatory proceeding than in tort because "in a tort case, the court must decide whether a particular manufacturer of substance A is legally and financially responsible for a particular injury to a particular individual."[168] Regulatory agencies, on the other hand,

> [A]re responsible for protecting the general public from the potential future adverse effects of toxic substances. The regulatory restrictions they can impose often include mandatory testing, mandatory labeling, emissions limits, exposure limits, and, in an extreme case, a ban on a substance. When deciding whether to impose a regulatory restriction, the agency asks whether there is sufficient evidence of a general causal relationship between substance A and injury X to justify imposition of a regulatory restriction.[169]

Peirce concludes that,

> The two causal questions differ both with respect to their degree of particularity and with respect to the degree of confidence with which they must be answered. Thus, for instance, an agency often will justify imposition of a regulation by finding that substance A has some potential to cause some future harm to society, for example, ten premature deaths per year attributable to cancer. The agency does not have to support its causal finding with a high degree of confidence.[170]

But when the risk of serious illness or death is extraordinarily high, law must decide whether to relax causation standards to less demanding, but logically reasonable, probability formulations. As physicians have observed,

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temporality, biological gradient, plausibility, coherence, experiment, and analogy." Christoper J. Nowinski, et al., *Applying the Bradford Hill Criteria for Causation to Repetitive Head Impacts and Chronic Traumatic Encephalopathy*, 13 FRONTIERS IN NEUROLOGY (2022) *available at* https://www.frontiersin.org/journals/neurology/articles/10.3389/fneur.2022.938163/full#B36.

[165] Ellen G. Galantucci and Kristen A. Monaco, *Understanding latency in fatal occupational injuries*, U.S. BUREAU OF LABOR STATISTICS, BEYOND THE NUMBERS (April 2021) *available at* https://www.bls.gov/opub/btn/volume-10/latency-in-fatal-occupational-injuries.htm.

[166] Kristen E. Schleiter, *Proving Causation in Environmental Litigation*, AMA JOURNAL OF ETHICS, VIRTUAL MENTOR. 2009;11(6):456-460. doi: 10.1001/virtualmentor.2009.11.6.hlaw1-0906

[167] Richard J. Pierce, Jr., *Causation in Government Regulation and Toxic Torts*, 76 WASH. U. L. QUART. 1307 (1998).

[168] *Id*. at 1307.

[169] *Id.* Of course, violation of the restriction leads to liability.

[170] *Id.*

> Outside of communicable or Mendelian genetic diseases, causation is rarely "proven" or "established," especially for diseases involving complex environmental exposures. In these instances, causation is a continuum from highly unlikely to highly likely, and no single study can prove causation. Epidemiologists Lucas and McMichael have stated causation is "merely an inference based on an observed conjunction of two variables (exposure and health status) in time and space."[171]

If it were necessary to prove with absolute certainty that working conditions caused disease, it would mean the consistent unavailability of remedies for harm probably caused by employers (or other responsible actors like products manufacturers). But this is not the causal standard the law requires for victims to establish liability, or the standard it has ever required. In the words of the Restatement Third of Torts:

> [C]ourts may be relying on a view that "science" presents an "objective" method of establishing that, in all cases, reasonable minds cannot differ on the issue of factual causation. Such a view is incorrect. First, scientific standards for the sufficiency of evidence to establish a proposition may be inappropriate for the law, which itself must decide the minimum amount of evidence permitting a reasonable (and, therefore, permissible) inference, as opposed to speculation that is not permitted. . . . [S]cientists report that an evaluation of data and scientific evidence to determine whether an inference of causation is appropriate requires judgment and interpretation. Scientists are subject to their own value judgments and preexisting biases that may affect their view of a body of evidence. There are instances in which although one scientist or group of scientists comes to one conclusion about factual causation, they recognize that another group that comes to a contrary conclusion might still be "reasonable." These scientists' views reflect their scientific experience outside the courtroom. They may have different views about specific instances of conflicting scientific testimony in a courtroom.[172]

To the extent that entrenched interests doggedly resist legal coverage of such disease, workers must in a like manner resist those interests. Fighting back should be much easier organizationally if workers take seriously the idea that they have suffered a century-long-wrong—a preliminary taking;[173] an incorrect constitutional assumption that states may not be challenged

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[171] Nowinski, *supra*. *quoting* Lucas RM, McMichael AJ. *Association or Causation: evaluating links between "environment and disease*, BULL WORLD HEALTH ORGAN. (2005) 83:792–5 *available at* https://pubmed.ncbi.nlm.nih.gov/16283057/

[172] RESTATEMENT (THIRD) OF TORTS § 28 CMT. C (Am. L. Inst. 2010).

[173] For the situation in 1971 *see* LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92ND CONG., SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR & PUBLIC WELFARE 1138, at § 27 (Comm. Print 1971); 29 U.S.C. § 676 (1970):

> [T]he vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and . . . the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation . . . [I]n

when unreasonably deciding not to cover occupational disease under arbitrary determinations of "non-causation."

B. Firefighter Cancer Presumptions

One path of worker resistance to noncoverage of occupational disease has been the creation of firefighter cancer "presumptions" of causation[174]—which did not formally exist as a matter of workers' compensation law—but without which the law might leave work-related cancers uncovered as "too hard to prove" under cramped notions of causation. The presumptions not only exist, but are proliferating.[175]

Firefighting is recognized as a hazardous occupation, and is associated with a significant increase in the risk of developing certain cancers.[176] "Firefighters may inhale, ingest, or have skin contact with known carcinogens such as polycyclic aromatic hydrocarbons and benzene. Exposure to firefighting activities leads to increased urinary levels of a variety of chemicals including PAHs, benzene, organo-chlorine and -phosphorus compounds, phenols, phthalates and heavy metals and metalloids."[177]

Predictably, the difficulty with covering firefighter cancers with workers' compensation centers on specific causation.[178] An increase in risk is not necessarily the same as causation, depending on how the latter is defined.[179] No matter how much probabilistic information scientists have on the relationship between firefighting and cancer, plaintiffs or claimants will never be able

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> recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.

In support of an argument that the "taking" is ongoing *see* Christpher J. Godfrey, *3 Concerning Trends for Injured and Ill Workers*, U.S. DEPARTMENT OF LABOR BLOG, November 18, 2022 *available at* https://blog.dol.gov/2022/11/18/3-concerning-trends-for-injured-and-ill-workers. *See also* INSULT TO INJURY: AMERICA'S VANISHING WORKER PROTECTIONS, NPR SPECIAL SERIES *available at* https://www.npr.org/series/394891172/insult-to-injury-americas-vanishing-worker-protections.

[174] Black's Law Dictionary defines a presumption as,

> A legal inference or assumption that a fact exists because of the known or proven existence of some other fact or group of facts. • Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcomes it with other evidence. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption. BLACK'S LAW DICTIONARY (12th Ed. 2024)

[175] *See infra*. n.181

[176] Lee DJ, Ahn S, McClure LA, Caban-Martinez AJ, Kobetz EN, Ukani H, Boga DJ, Hernandez D, Pinheiro PS. *Cancer risk and mortality among firefighters: a meta-analytic review*. FRONT ONCOL. 2023 May 12;13:1130754. doi: 10.3389/fonc.2023.1130754. PMID: 37251928; PMCID: PMC10213433.

[177] *Id. citing* Stec AA, Dickens KE, Salden M, Hewitt FE, Watts DP, Houldsworth PE, et al.. *Occupational exposure to polycyclic aromatic hydrocarbons and elevated cancer incidence in firefighters*. SCI REP (2018) 8(1):2476. doi: 10.1038/s41598-018-20616-6; Barros B, Oliveira M, Morais S. *Urinary biohazard markers in firefighters*. ADV CLIN CHEM (2021) 105:243–319. doi: 10.1016/bs.acc.2021.02.004

[178] Barbara Feder Ostrov, *State Laws Favor Benefits for Firefighters With Cancer. Cities and Counties Keep Denying Them*, MOTHER JONES, March 3, 2023 ("Firefighters have found that pinpointing the cause of cancer can be extraordinarily difficult. Genetic, behavioral and environmental risk factors come into play.") *available at* https://www.motherjones.com/environment/2023/03/state-laws-favor-benefits-for-firefighters-with-cancer-cities-and-counties-keep-denying-them/.

[179] *Id*.

to definitively prove specific causation in an individual case. And perhaps more alarming, after a period of time in a given legal culture, workers and their survivors may come to believe the disease cannot be "proven." As Elinor Schroeder has recounted, a late 1970s study by Dr. Irving Selikoff showed that only half of the widows of a group of 995 insulation workers dying from asbestos exposure filed workers' compensation claims:

> Their husbands belonged to powerful construction unions that presumably have the resources to provide information to survivors. Asbestos had also already been recognized as a virulent health hazard capable of causing the kinds of respiratory illnesses from which the decedents had suffered. If the number of claims filed was so low among widows with resources available to them, the number of potentially compensable occupational disease claims outside the workers' compensation system could be staggering. Not only did half the widows fail to file claims, but for those who did file, benefit levels were low. Of the 125 widows who filed for workers' compensation benefits, nineteen received income only from workers' compensation; these benefits replaced only 36.2% of their losses. Among those widows who received income from sources in addition to workers' compensation, workers' compensation benefits replaced a larger portion of their loss, up to 58.4%.[180]

The somber inferences one can draw is that the insulation worker widows knew (or thought they knew) they would be unlikely to prevail in litigation; and that even if they did prevail the recovery would be meager. One might anticipate the same trends for the survivors of firefighters stricken at and by their work.

Yet the story in firefighting has become different. Throughout the United States, and in Canada, "firefighter presumptions" have been legislatively implemented.[181] Most states have enacted firefighter presumption laws of some kind.[182] In 2022, the federal government enacted the Federal Firefighters Fairness Act of 2022. The federal bill provides that chronic obstructive pulmonary disease, mesothelioma, and other specified cancers of those employed in fire protection activities for at least five years, are presumed to be proximately caused by such employment for purposes of a disability or death claim under the federal workers' compensation program.[183] Firefighter presumption laws continue to expand despite disputes over competing interpretations of scientific studies on the relationship between firefighting duties and development of various diseases (especially cancers).[184] Overall, firefighter presumptions apply most often to cancer, lung

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[180] Schroeder, *Legislative and Judicial Responses*, *supra*. n.159 at 158-159.

[181] Fawn Racicot and Bruce Spidell, *Presumptive Coverage for Firefighters and Other First Responders*, NCCI RESEARCH BRIEF (2018); ASSESSING STATE FIREFIGHTER CANCER RESEARCH, NATIONAL LEAGUE OF CITIES (2009).

[182] INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, PRESUMPTIVE HEALTH INITIATIVE *see* https://www.iaff.org/presumptive-health/. Indeed, the causation presumptions have moved beyond "cancer" to encompass heart disease, lung disease, cancer, infectious diseases, behavioral health, and other conditions such as hernias, Parkinson's and hearing disorders. The presumptions are implemented through workers' compensation, retirement system, and general provisions of state law. https://www.iaff.org/wp-content/uploads/Presumptive-Disability-Chart-12-16-2022.pdf.

[183] *See* Brad Dress, Federal firefighters score major health care win in defense bill, THE HILL, Jan. 6, 2023 *available at* https://thehill.com/policy/defense/3801390-federal-firefighters-score-major-health-care-win-in-defense-bill/.

[184] There are also significant evidentiary issues that impact the manner in which the presumptions are implemented. Michael C. Duff, *Post-Traumatic Stress Disorder (PTSD) Coverage and other Expanding Benefit Changes in the Workers' Compensation Insurance Marketplace: Academic Legal Perspective*, SAINT LOUIS U. LEGAL STUDIES

and respiratory conditions, blood and infectious diseases, and heart and vascular conditions.[185] Remarkably, the presumptions have expanded even though academic researchers have at times argued against them because, according to the researchers, they are not sufficiently likely to produce defensible outcomes.[186] Firefighters, their unions, and various legislatures have disagreed. It is also evident that presumptions have resulted as part of an aggressive worker and union campaign of expansion.[187] "And in July 2022, after a review of research, the World Health Organization reclassified firefighting as a definitively cancer-causing occupation after years of calling it 'possibly' carcinogenic."[188]

None of what has been said should suggest that passage of firefighter presumptions has been easy or uncontroversial, or even that where enacted the presumptions are easily enforced. Many cities—typically the employers of firefighters—routinely reject cancer claims despite the presence of the presumptions; and certain associations of cities and counties contribute to a culture that suggests (to repeat the argument charitably) that the presumptions are illegitimate.[189] Despite these considerable obstacles, a "Magna Carta moment" seems to have been reached: workers refuse to allow hyper technical definitions of causation to scuttle legitimate claims for compensation for workplace injury or death. It is one thing to establish a workers' compensation system, even if inadequate in the way this article has contended. It is another thing to allow employers—especially governmental employers—to completely escape liability for harms that were probably caused by work. If current law allows for such an outcome, workers must pursue what the law should confer.

C. COVID 19 Disease Presumptions

Perhaps nothing could have presented the issue of legal non-coverage of disease claims more starkly than the COVID-19 pandemic. During the COVID-19 era the majority of states aggressively denied Covid-based workers' compensation claims, either because work could not be proved the cause of the condition (so it was claimed),[190] or because a state did not as a matter of law cover "ordinary diseases of life" before the pandemic.[191] A generalization of the impossibility

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RESEARCH Paper No. 2020-52, *available at*
SSRN: https://ssrn.com/abstract=3502297 or http://dx.doi.org/10.2139/ssrn.3502297

[185] *See* Racicot and Spidell, *Presumptive Coverage for Firefighters*, *supra*. n.181.

[186] Peter Rousmaniere, *Presumption Laws: Sausage Making on Display*, WORKERS' COMPENSATION.COM (Oct. 16, 2019) *available at* https://www.workerscompensation.com/expert-analysis/rousmaniere-presumption-laws-sausage-making-on-display/ (noting opposition of academic researcher Frank Neuhauser).

[187] *See generally* NATIONAL LEAGUE OF CITIES, ASSESSING STATE FIREFIGHTER CANCER PRESUMPTION LAWS AND CURRENT FIREFIGHTER CANCER RESEARCH iv-v (2009) *available at*
http://tkolb.net/firereports/presumptionreport2009.pdf.

[188] *See supra*. n.178.

[189] *See* Ostrov, *State Laws Favor Benefits for Firefighters With Cancer. Cities and Counties Keep Denying Them*, *supra*. n.178.

[190] It will be recalled that the essence of the U.S. Supreme Court's opinion in National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 595 U.S. ___ (2022) was that Covid is not an "occupational" disease. Of course, in workers' compensation disability resulting from the combination of a work related and non-work related cause has historically often been fully compensable. Kurt Garve, *Compensable Aggravation and Acceleration of Pre-Existing Infirmities Under Workmen's Compensation Act*, 22 KENTUCKY L. J. 1934) (discussing situations under which combinations of work-related and non-work related causes of disability may lead to compensation under workers' compensation).

[191] Michael C. Duff, *What COVID-19 Laid Bare: Adventures in Workers' Compensation Causation*, 50 SAN DIEGO L. REV. 291, 299-300 (2022).

of proof, in the context of joint causation especially, was quite wrong as a doctrinal matter of workers' compensation law, even if administrative officials genuinely believed it was true.[192]

When state legislators simultaneously conferred tort immunity on employers who arguably negligently exposed their workers to the pandemic, workers were confronted with "dual denial" of their claims under both the tort and workers' compensation legal regimes.[193] Technically, while the laws allowed for tort actions where an employer had been "grossly negligent," and permitted gross negligence to be proven by "clear and convincing" evidence, they were widely understood as conferring tort immunity;[194] unsurprisingly plaintiff-workers not covered by workers' compensation also did not file tort claims.[195] The dual denial dilemma—which is really a form of inchoate appeal to "the ink blot"—presents an especially aggravated instance of remedial deprivation. Several states include in their constitutions "right to remedy" provisions that may be implicated in remedy elimination, unless the state concludes such a provision has no substantive content.[196] The dual denial seemed to offend such provisions; and at a minimum generated significant constitutional introspection.[197]

As was the case with firefighters being left without recourse to pursue cancer claims, legislatures in some states suspended the standard operation of workers' compensation causation law by creating Covid presumptions of causation.[198] The legal modification tracked Mark Blyth's analogical notion of Covid "shock absorbers": how else could workers be provided with cash payments to survive?[199] Under the presumption model, COVID-19, if accurately diagnosed, was presumed to have been caused by the workplace; the burden then shifted to the employer to show otherwise.[200]

The brief Covid presumption episode again demonstrated the potential for rules of liability for workplace harm being modified in reaction to a strong public expectation of a safe workplace—even in the midst of a public emergency, and without being dissuaded by a picture of workers'

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[192] *Id*.

[193] Jason R. Bent, *Compensability, Opportunism, and the Race to the Bottom: A View from Near the Bottom*, 37 ABA JOURNAL OF LAB. & EMP. LAW 2, 223 (2023) (discussing "dual denial"—where tightened workers' compensation eligibility standards lead to a denial of workers' compensation benefits, yet the law bars access to a tort claim for the injury).

[194] Clayton J. Masterman, *COVID-19 Tort Reform*, 34 HEALTH MATRIX 133, 157 (2024) (explaining COVID-modified negligence regime).

[195] Betsy J. Gray and Samantha Orwoll, *Tort Immunity in the Pandemic*, 96 INDIANA L. J. 66, 71 (2021).

[196] *See* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003) (discussing in detail the manner in which right to remedies provisions in state constitutions have been treated and analyzed by state courts).

[197] Sierra Stubb & John Fabian Witt, *Tort Law's New Quarantinism: Race And Coercion In The Age Of A Novel Coronavirus*, 71 DEPAUL L. REV. 613, 614 (2022) ("For the first time in the history of the law of epidemics, immunity for private parties from legal claims became a central element of the legal response to infectious disease.").

[198] See JOSH CUNNINGHAM, COVID-19: WORKERS' COMPENSATION, NAT'L CONF. STATE LEGISLATORS (Dec. 9, 2020), https://www.ncsl.org/research/labor-and-employment/COVID-19-workers-compensation.aspx [https://perma.cc/UDP3-9SZR]; SAIF, COVID-19 WORKERS' COMPENSATION PRESUMPTION BY STATE (2020).

[199] Mark Blyth, *The U.S. Economy Is Uniquely Vulnerable to the Coronavirus: Why America's Growth Model Suggests It Has Few Good Options,* FOREIGN AFFAIRS, March 30, 2020 (predicting that the United States would have to significantly if temporarily reconfigure its state benefits apparatus to survive the pandemic) *available at* https://www.foreignaffairs.com/articles/americas/2020-03-30/us-economy-uniquely-vulnerable-coronavirus. To play out another similar Covid analogy Blyth employed, Europe was a Volvo with airbags; the U.S. was a very fast "Mustang" with very few protections. Álvaro Guzmán Bastida, CHANGE THE FURNITURE, October 10, 2020 (interviewing Blyth) available at https://www.phenomenalworld.org/interviews/mark-blyth/.

[200] Duff, *What Covid Laid Bare*, *supra*. n.191 at 299.

compensation law that has quietly been shrinking for decades.[201] The lesson of the Covid statutory tinkering with causation presumptions is that politicians understand very well that workers are voters. And workers believed that it was fundamentally unacceptable to leave persons probably harmed by work without a remedy. The point of this article is to show that such a belief has constitutional teeth.

IV. LABOR LAW DISRUPTION OF WORKPLACE SAFETY AND INJURY REMEDY EROSION

To this point, the article has focused on a certain vision of what the law should be, or could be, given a fair reading of the constitution or, more narrowly, given a fair reading of torts or workers' compensation law. The preceding Part showed that the general population—which obviously includes workers—has evinced knowledge of how to insist upon special purpose statutes to protect workers in unique situations.[202] This is not the first time that such insistence has driven changes in the work injury legal architecture. Even before the passage of OSHA, in 1970, concerns about the work-related injuries and deaths of coal miners were a powerful driver of modifications to work law. "The Federal Coal Mine Health and Safety Act of 1969 was the first federal program to compensate black lung claimants and their survivors."[203] Congress later passed the Black Lung Benefits Act of 1972,

> [t]o establish state workers' compensation payment systems for coal workers' pneumoconiosis (CWP), commonly referred to as black lung disease, with the approval of the U.S. Department of Labor (DOL). However, no state workers' compensation system has ever met the standards originally set forth in the Act and operators could not pay CWP benefits.[204]

The "could not pay" formulation is interesting and misleading. The real story is that states refused to cover black lung under state workers' compensation systems,[205] so Congress found it necessary to become involved.[206] In the context of this article the most interesting fact about the

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[201] *See* Spieler and Burton, *The lack of correspondence between work-related disability and receipt of workers' compensation benefits*, *supra*. n.31.

[202] WHY WORKERS ARE ENGAGING IN COLLECTIVE ACTION ACROSS THE UNITED STATES IN RESPONSE TO THE CORONAVIRUS CRISIS, WASHINGTON CENTER FOR EQUITABLE GROWTH, May 1, 2020 ("Some of these essential workers are now staging collective actions to demand hazard pay, greater say in workplace safety standards, and protective gear—building on the large-scale collective action by teachers and other workers over the past 2 years. These actions are becoming more and more frequent . . .")

[203] Alex York and Christine M. Fleming, *Coal mining black lung claims: A struggling industry*, MILLIMAN 1 (2022) *available at* https://us.milliman.com/en/insight/coal-mining-black-lung-claims-a-struggling-industry.

[204] *Id.*

[205] "Despite the fact that physicians working among coal miners in the nineteenth century recognized and called attention to a distinct type of respiratory disease associated with the inhalation of coal mine dusts, state and federal public health authorities ignored that groundwork for much of the twentieth century and failed to avert what has been called 'a public health disaster.'" Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025, 1026 (2002). For a history of black lung disease in the United States through the prism of public health *see generally* ALAN DERICKSON, BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER (1998).

[206] "Most state workers' compensation laws did not then provide clear causes of action for occupational diseases, and claims for black lung were frequently blocked by 2- or 3-year state statutes of limitation, which were geared to time-definite, traumatic injuries. The filing deadlines often expired before the symptoms of pneumoconiosis alerted the

subsequent massive federal government involvement after state resistance to payment of benefits is that:

> From the perspective of politics, [black lung] is the story of workers who moved from passive frustration about occupational disease to militancy about legislative solutions. With only vacillating union support, miners in the late 1960s used the pressure of strikes to force state and federal officials to recognize what miners had long known: that dusts in both anthracite and bituminous mines can grievously impair breathing function and even cause premature death.[207]

While the enormity of the ongoing, and in some ways growing, black lung problem in the United States is beyond the scope of this article,[208] the fact is that workers would not tolerate systemic non-compensation for black lung; and in reaction engaged in effective self-help[209] to alter the remedial landscape. Whether those workers were thinking precisely in terms of the "Magna Carta" or the "ink blot" is not as important as their unwillingness to tolerate continuation of a work environment that was fundamentally "unjust."

Classic collective action problems may slow the process of legislative reform.[210] Awareness of hazardous working conditions, or the inadequacy of work injury remedies, is often available only to the fortuitously powerful;[211] or in the direst of circumstances of a public health emergency (as in an unprecedented pandemic or repeated mine collapses). While, leaving the pandemic to one side, a death toll of 120,000 workers per year from occupational disease seems dire,[212] the general public is seldom aware of this "latency-context death toll."[213] In such

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retired miner he had a claim. State statutes that did provide compensation for black lung were found to pay inadequate benefits." John S. Lopatto III, *The Federal Black Lung Program: A 1983 Primer*, 85 WEST VIRGINIA L. REV. 681 (1983).

[207] *See* Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, *supra*. n.205 at 1026-1027.

[208] *See generally* Jacob Snuffer, *The Black Lung Benefits Improvement Act Of 2022: Benefits To Miners & The Attorneys Who Serve Them*, 22 APPALACHIAN JOURNAL OF LAW (2023); Michael C. Duff, *The Scourge of Black Lung: Still a Terrible Problem We Are not Doing Enough to Stop*, LEXINGTON HERALD LEADER, July 26, 2022 *available at* https://www.kentucky.com/opinion/op-ed/article263810713.html.

[209] The right of even non-union private sector employees to engage in work stoppages to protest unsafe working conditions has been established since 1964. Labor Board v. Washington Aluminum Co., 370 U.S. 9 *supra*. n.40.

[210] MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971) (arguing that rational, self-interested individuals will not act to further group interests without coercion or other incentives). The problem here may be that the general population sometimes cannot see themselves as vulnerable workers. The problem of black lung had been under discussion within the federal government since 1865 and it required several series of "accidents" to finally move the legal structure to action. *See* 91ST CONGRESS HOUSE OF REPRESENTATIVES REPORT ON FEDERAL COAL MINE HEALTH AND SAFETY ACT, No. 91-563, October 13, 1969 *available at* https://arlweb.msha.gov/solicitor/coalact/69hous.htm.

[211] In 2024, private sector unionism stands at 6% in the United States; union density in "protective services" (including firefighters) is about 34%. https://www.bls.gov/news.release/union2.htm.

[212] According to the AFL-CIO in 2021, the most recent year for which statistics were available, 343 workers died each day from hazardous working conditions; 5.190 workers were killed on the job, and an estimated 120,000 workers died from occupational diseases. DEATH ON THE JOB: THE TOLL OF NEGLECT (2023) *available at* https://aflcio.org/reports/death-job-toll-neglect-2023.

[213] *See* JIM MORRIS, COMMENTARY: THE UNSEEN TOLL OF WORKPLACE DISEASE IN AMERICA, THE CENTER FOR PUBLIC INTEGRITY, INVESTIGATING INEQUALITY *available at* https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/commentary-the-unseen-toll-of-workplace-disease-in-america/ ("Occupational disease lacks the macabre drama of a San Bernardino or a Newtown. The bodies cannot be easily counted. The victims may

circumstances, the power of worker concerted action may come, seemingly suddenly, to the fore, as it did in the case of black lung. When harms are subtler, less widespread, or hidden,[214] concerted activity may be pressed into service in a way that facilitates a labor renegotiation of safe working conditions, a new bargain.[215] Union advocates have in the past discussed the need to also negotiate health and safety terms and conditions, and to include them within the body of formal collective bargaining agreements.[216] The article will take up the discussion, but with a twist. Organizers and advocates for workers should seek improvements to health and safety, preventative rules and after-the-fact remedies, within the paradigm of labor law; but they should proceed in a hyper-charged, restitutionary spirit of "Magna Carta"[217]: workers seek what the law should already have provided them. The employer's existing injury regime is fundamentally wrong.

A. Relevant Labor Law Principles

Federal "labor law" carries within it the potential for significantly disrupting the "no duty" inner-compass of many employers.[218] But that potential is not universally well recognized. Section 7 of the National Labor Relations Act—the foundational federal labor relations statute first enacted in 1935—states "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."[219] The federal courts, including the U.S. Supreme Court, have recognized since 1964 that the provision protects the rights of employees to concertedly engage in protests, including work stoppages, over what the employees believe to be unsafe or unhealthy working conditions.[220] In the case of non-union employees such work stoppages need not even be "reasonable"—a good faith belief of impending danger is sufficient for protection.[221] So the first

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hang on for years or decades before quietly succumbing. Often, their deaths are acknowledged only by their families, friends and former co-workers.")

[214] A very recent example is the occurrence of ergonomic injuries at Amazon warehouses, especially during Amazon "prime days." *See* PEAK SEASONS, PEAK INJURIES: AMAZON WAREHOUSES ARE ESPECIALLY DANGEROUS DURING PRIME DAY AND THE HOLIDAY SEASON—AND THE COMPANY KNOWS IT UNITED STATES SENATE, HEALTH, EDUCATION, LABOR, & PENSIONS COMMITTEE, AMAZON INVESTIGATION INTERIM REPORT, July 15, 2024 *available at* https://www.help.senate.gov/imo/media/doc/help_committee_amazon_interim_report.pdf.

[215] *See supra*. n.4 and accompanying text.

[216] *See* BARGAINING LANGUAGE: WORKER AND UNION RIGHTS, LABOR OCCUPATIONAL HEALTH PROGRAM, UNIVERSITY OF CALIFORNIA BERKELEY *available at* https://lohp.berkeley.edu/collective-bargaining/bargaining-language-1/; JAMES W. PLATNER, DEBI DUKE, AND SUSAN ZUCKER, NEGOTIATING CONTRACT LANGUAGE ON HEALTH & SAFETY: A UNION GUIDE TO PLANNING, WITH SAMPLE CLAUSES, CORNELL UNIVERSITY CHEMICAL HAZARD INFORMATION PROGRAM (1991) *available at* https://cseany.org/wp-content/uploads/2022/03/Negotiating-Contract-Language-for-Health-and-Safety.pdf, Such agreements are enforceable either through a grievance arbitration process contained in a collective bargaining agreement or in a federal court proceeding under 29 U.S.C.

[217] *See supra*. Part II.

[218] Andrew Melzer & David Tracey, *Employers Should Owe a Duty of Loyalty to Their Workers,* CARDOZO L. REV. DE NOVO 112 (2020) (" . . . [A]part from abiding by particular laws—mainly antidiscrimination and retaliation statutes—employers are typically free to treat (and mistreat) employees as they wish.") *available at* https://cardozolawreview.com/wp-content/uploads/2020/08/Melzer-Tracey_de-novo_42.pdf

[219] 29 U.S.C. § 185(a).

[220] 4 N.L.R.B. v. Washington Aluminum Company, 370 U.S. 9 (1962); N.L.R.B. v. Tamara Foods, Inc., 692 F.2d 1171, 1176 (1982) (upholding NLRB's authority to award backpay and reinstatement for employer violation of the right of refusal).

[221] Tamara Foods, *Id*. at 1176. Union employees working under a collective bargaining agreement must engage only in objectively reasonable work stoppages to avoid having the job action found a strike and potentially in violation of

workplace injury protection that labor law confers upon employees is the right to concertedly refuse dangerous work.[222]

Well before these federal protections were eventually (if slowly) upheld by courts, "[w]orkplace safety was a centerpiece of Progressive Era reforms."[223] During the early 20th century, "[t]he safety reformers' stated aims were to reduce the risk faced by workers and ensure that the families of workers injured or killed in accidents received reasonable medical care and compensation for lost earnings."[224] Yet, "[o]rganized and unorganized workers in the United States have been struggling for well over a century to obtain safe and healthy working conditions."[225] Before the New Deal, organized labor and workers' organizations had little power to compel employers to engage in safer work practices.[226] At one point, the American Federation of Labor and the Congress of Industrial Organizations (before their unification as the "AFL-CIO") backed competing proposals for safety and health provisions.[227] "But during the organizing drives of the 1930s labor leaders frequently criticized management insensitivity to the health and safety of workers and implied that building a strong union would give workers a better chance of obtaining corrective action."[228] Through the 1950s, "[t]he legacy of American federalism could be seen . . . as the AFL worried about the constitutionality of federal compensation standards."[229] It is perhaps not surprising that the famous U.S. Supreme Court opinion in *Lochner v. New York*,[230] involved the supposed "right" of an employer to "contract" with an employee to work in unsafe working conditions.[231] The quashing of the New York state safety law helped to chill the emergence of a multistate occupational law for some time.[232]

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a no strike provisions (commonly included in collective bargaining agreements). *Id*; *see also* 29 U.S.C. § 143. This protection is separate and from similar but more nebulous protection under OSHA. *See* Kathy Wilkes, *The Right to Refuse Dangerous Work*, THE PROGRESSIVE MAGAZINE, December 21, 2021 *available at* https://progressive.org/op-eds/right-to-refuse-dangerous-work-wilkes-211221/.

[222] This would not be the first time it has been argued that spontaneous strikes could "represent the making of a new right." Ahmed White, *Its Own Dubious Battle: The Impossible Defense Of An Effective Right To Strike*, 2018 WISCONSIN L. REV. 1065 *citing* James M. Landis, Chairman*, Fed. Exch. Comm'n, Address before the Harvard Club of Boston* (Mar. 17, 1937); James M. Landis, Address before the Eastern Law Students Conference (Mar. 20, 1937). Landis was at the time den-elect of the Harvard Law School.

[223] Price V. Fishback, *The Irony of Reform. Did Large Employers Subvert Workplace Safety Reform, 1869 to 1930*? *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 285 (2006) *available at* https://www.nber.org/system/files/chapters/c9988/c9988.pdf.

[224] *Id*.

[225] Robert Asher, *Organized Labor And The Origins Of The Occupational Safety And Health Act*, 24 New Solutions 279 (2014) (republishing 1991 article) *available at* https://journals.sagepub.com/doi/pdf/10.2190/NS.24.3.d.

[226] *Id*. at 281.

[227] *Id*. at 286-288.

[228] *See id.* at 286.

[229] *Id*. at 298, fn.21 *citing* Herbert L. Gidansky, *Harvard Student Legislative Research Bureau, to Representative Thomas P. O'Neill, Jr., 8 Mar. 1957, Box 56, AFL, AFL-CIO Department of Legislation*, The George Meany Memorial Archives.

[230] 198 U.S. 45 (1905).

[231] Section 110 of the labor law of the State of New York, provided that "no employes shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day." *Id.* at 52. New York employers argued that enactment of the law was not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to labor, and, as such, it is in conflict with, and void under, the Federal Constitution. *Id.* The court found that "[t]he act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts." *Id*. at 61.

[232] *See supra*. n.229. Hence, the Lochner *era*.

But the state statutory protection of worker health and welfare that courts of the *Lochner* era deemed the fourteenth amendment to have effectively disabled—and this article has contended that the courts did not consider seriously enough a countervailing fourteenth amendment right to adequate injury remedies for workers[233]—also led to the federal New Deal labor structure, formally made possible through mandatory federal labor law "contractualization."[234] Aside from the refusal-of-dangerous-work right referred to above,[235] unionized employees have the right to insist on bargaining over improvement of the safety and injury compensation paradigm at work.[236] The National Labor Relations Act requires private sector employers to negotiate over "mandatory subjects of bargaining," with a union lawfully certified or recognized with respect to an "appropriate unit" (or grouping) of its employees.[237] Workers' compensation and workplace safety issues are mandatory subjects of bargaining.[238] This means that as a matter of law the employer must bargain over safety provisions; refusal to do so violates the NLRA.[239] Thus, if a union desires to bargain to include particular "safety provisions" in a collective bargaining agreement with an employer, or to bargain over injury remedies, the employer may not refuse to bargain, though it is not required to agree to inclusion of any particular proposal in an agreement.[240] The union in turn could insist on the inclusion of provisions to the point of agreement or good faith impasse, after which it could lawfully strike.[241]

To be clear, strikes are very difficult[242]—often impossible—for unions to carry out, and no one could responsibly suggest they be attempted in other than extreme circumstances.[243] Even after establishment of federal labor law in the 1930s, bargaining over safety was difficult, especially because not enough was known about, in particular, the etiology of occupational diseases:

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[233] *See supra*. Part II. The question was raised almost in passing in early, seminal U.S. Supreme Court opinions on workers' compensation. *See* Duff, *How the U.S. Supreme Court Deemed the Workers' Compensation Grand Bargain "Adequate" Without Defining Adequacy*, *supra*. n.66.

[234] *See* 29 U.S.C. 158 (a)(5) which (with its immediate predecessor, Section 8(5) of the Wagner Act) imposed on employers a very broad duty "to bargain collectively with the representatives of his employees."

[235] *See supra*. n.220 and accompanying text.

[236] *See infra*. n.238.

[237] Section 8(d) of the NLRA provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." A mandatory subject accordingly includes wages, hours, and other terms and conditions of employment.

[238] Jones Dairy Farm, 295 NLRB 113 (1989); NLRB v. Central Illinois Public Service Co., 324 F.2d 916 (7th Cir. 1963).

[239] Labor Board v. Borg-Warner Corp., 356 U.S. 342 (1958).

[240] James Friedman, *Keeping Big Issues Off The Table: The Supreme Court on Entrepreneurial Discretion And The Duty To Bargain*, 37 MAINE L. REV. 223, 228 (1985) (explaining the operation of Section 8(d) of the NLRA, which is where the rule of law originates).

[241] N.L.R.B. v. American Nat. Can Co., 924 F.2d 518, 524 (4th Cir. 1991) (observing that health and safety conditions are mandatory subjects of bargaining); JENN HAGEDORN, MPH, CLAUDIA ALEXANDRA PARAS, AND AMY HAGOPIAN, PHD, MHA, THE ROLE OF LABOR UNIONS IN CREATING WORKING CONDITIONS THAT PROMOTE PUBLIC HEALTH, AMERICAN JOURNAL OF PUBLIC HEALTH, June 2016, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4880255/#!po=1.92308.

[242] "Economic" strikers may be immediately permanently replaced, many states do not allow unemployment benefits for strikers, and if the employer wishes to seize the initiative it may lawfully lock out workers in most circumstances. PAUL SECUNDA, JEFFREY M. HIRSCH, MICHAEL C. DUFF, LABOR LAW 513-14 (2017).

[243] Ahmed White, *Its Own Dubious Battle: The Impossible Defense of An Effective Right to Strike*, *supra*. n.222 (discussing gradual weakening of the right to strike during the history of American labor law).

> Preventing occupational diseases posed even greater problems for unions. In some instances, there is no doubt that union leaders, like those of the [United Mine Workers union] after World War II, cut deals with management that traded off action to prevent diseases in return for higher pensions and wages. But union "quiescence" in agitating for the prevention of and compensation for occupational diseases usually had been caused by lack of knowledge about the etiology of occupational diseases. When sound scientific studies warning about specific occupational diseases were eventually published, previously "silent" union newspapers actively publicized the dangers. Wage earners also knew that safety laws or costly compensation coverage of occupational diseases could lead employers to close down their enterprises. To preserve their jobs workers sometimes chose to avoid confrontations about accidents or exposure to occupational diseases.[244]

But the ongoing risk of workplace harm, and the reality of historic undercompensation for harms suffered that is not coming to fuller fruition, represent extreme circumstances; and it was the original claim for workplace rights in the United Kingdom in the 19th century—against a hostile legal regime of master-servant law—that launched worker agitation for safety in the U.K., the United States, and Australia.[245] It was precisely the strategic use of strikes in the coal mines that led to federal regulation of safety and injury remedies in that industry.[246] The reality of 120,000 persons being killed each year from latent occupational diseases may be the tragic consequence of further delay.[247] An ink blot constitution can be a sword for employees as well as a shield for employers.

A recent and dramatic example of the potential for labor pressure positively altering workers' safety involves the national collective bargaining agreement between United Parcel Service and the Teamsters' Union. According to a news account,

> UPS package delivery trucks, the famous brown ones that drive through neighborhoods, do not have air conditioning, a fact the company justifies by saying that the vehicles frequently start and stop, requiring workers to shut the engine and open the doors. Thermometer readings in the back of UPS trucks have reached 150 degrees Fahrenheit on occasion. Numerous drivers have suffered from heatstroke, dehydration, and other consequences, including several deaths.[248]

The health danger of the situation became a strike issue for the union; and an obstacle to negotiating a collective bargaining agreement—a strike (over that and other critical issues) would, at least in theory, have been the largest in the history of the United States.[249] Additional news reports made clear the magnitude of the union's victory,

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[244] Asher, *Organized Labor And The Origins Of The Occupational Safety And Health Act*, *supra*. n.225 at 289.
[245] Tom Banbury, *How Workers' Struggles Won our Rights*, TRIBUNE, May 1, 2021 *available at* https://tribunemag.co.uk/2021/05/how-our-workers-rights-were-won *see also* P. W. J. BARTRIP AND SANDRA B. BURMAN THE WOUNDED SOLDIERS OF INDUSTRY: INDUSTRIAL COMPENSATION POLICY, 1833-1897 (1984).
[246] *See supra*. n.207 and accompanying text.
[247] *See* DEATH ON THE JOB: THE TOLL OF NEGLECT, AFL-CIO *supra*. n.162.
[248] David Dayen, *UPS Workers Beat the Heat*, THE AMERICAN PROSPECT, June 14, 2023 *available at* https://prospect.org/blogs-and-newsletters/tap/2023-06-14-ups-workers-beat-the-heat/
[249] *Id*.

> The new contract includes an agreement to gradually equip the company's fleet of vehicles with air conditioning systems, new heat shields and additional fans. The agreement requires in-cab air conditioning in most UPS delivery vehicles purchased after Jan. 1, 2024. Two fans would also be installed in package cars, which make up most of the company's 93,000-vehicle fleet. Newer vehicles would also be equipped with exhaust heat shields . . . Existing and newly purchased package cars would be fitted with air induction vents to alleviate extreme temperatures in the back of the vehicles where cargo is loaded and unloaded.[250]

This development was obviously extremely important to the workers directly affected, and it occurred in the shadow of OSHA's woeful performance in attempting to enact a heat-related work safety standard.[251] On June 11, 2024, OSHA finally submitted "a proposed federal rule to protect indoor and outdoor workers from heat stress" for review by the White House.[252] Beyond the workers immediately affected, "UPS is a big enough employer that its attention to extreme-heat dangers could spur action for other workers, like FedEx trucks or Amazon warehouses."[253] This event suggests that progressive labor contracts have the power to create a kind of "me too" through subsequent regulatory codification of safety rules.[254]

While the UPS accomplishment is more about preventing injury before it occurs than compensating it adequately after it does (that is, it addresses regulatory more than remedial innovations), the two are inextricably linked. The Supreme Court, after all, quashed the Biden Administration's "shot or test" "emergency temporary standard" at the end of the pandemic, on the theory that COVID-19 was not a "workplace hazard," and was therefore outside the regulatory authority of OSHA.[255] This is another way of saying that COVID did not "arise out of" employment (to borrow workers' compensation terminology). It could just as easily be said that excessive heat does not "arise out of" employment. And there are many other environmental risks

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[250] Steve Banker, *UPS Strike Averted: Workers Gain Heat Protection*, FORBES, Aug. 23, 2023

[251] Bruce Rolfsen, *Summer Is Scorching*, *Why OSHA Has No Worker Heat Rule: Explained*, BLOOMBERG LAW, Aug.10, 2023 *available at* https://news.bloomberglaw.com/safety/summer-is-scorching-why-osha-has-no-worker-heat-rule-explained. For the best analysis of why OSHA has often been ineffective over the last few decades *see* THOMAS MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (1993).

[252] Bruce Rolfsen, *OSHA Worker Heat Stress Proposal Goes to White House for Review,* BLOOMBERG LAW, June 12, 2024.

[253] Dayen, *UPS Workers Beat the Heat*, *supra*. n.248

[254] In a union represented multi-employer bargaining unit a "me-too agreement . . . is a contract where an employer agrees to be bound by the terms of a CBA negotiated by a multiemployer association and local union." Sheet Metal Workers v. Four-C-Care, Inc.,929 F.3d 135, 142 fn. 4 (4th Cir. 2019). These "parity" clauses are found in both labor and commercial contexts. "Parity bargaining agreements are utilized to create parity in the labor market by tying the wages of one bargaining unit with the wages of one or more other bargaining units contracting with the same employer." Michael G. Gallagher, *Parity Bargaining in the Public Sector — a Mandatory, Permissive, or Illegal Subject*?, 15 UNIVERSITY OF BALTIMORE L. REV. 413, 416 (1986). It is very common for non-union employers to improve working conditions to match improvements in unionized workplaces and industries. *See* Max Nesterak, *Non-union workers see pay bump following UAW victory, and other labor news*, MINNESOTA REFORMER, Nov. 3, 2023 *available at* https://minnesotareformer.com/2023/11/03/non-union-workers-see-pay-bump-following-uaw-victory-and-other-labor-news/.

[255] National Federation of Independent Business v. Dep't of Labor, Occupational Safety and Health Administration, 595 U.S. ____ (2022), *slip op*. at 8.

potentially outside the coverage of either OSHA or workers' compensation.[256] The UPS-Teamsters contract represents a worker veto of the idea that heat is categorically not a working condition. From that simple rule of veto, the corollary that an employer is remedially responsible for heat related injury suffered at work becomes difficult to resist.[257]

B. Workers' Compensation Carve Out Provisions

Much closer to the remedial dimension of workplace injury—which plays a large role in questions of risk deterrence—is the functioning of workers' compensation. Although workers' compensation is a state-based system throughout the United States, there is no reason why federal labor law cannot influence the system's operation—particularly where the state system fails to deliver adequate remedies. By adequate one thinks in particular about states that summarily suspend total disability benefits after just a few years,[258] or pay a one-time "scheduled" benefit for workers who are permanently partially disabled.[259] But all kinds of inadequacies can be imagined, including allowing workplace interchange between individuals who have been exposed to known agents of communicable workplace disease.[260]

About ten states have created statutory workers' compensation carve-out systems. A carve-out system allows union and employers to "carve-out" alternatives to state mandated workers' compensation.[261] This legislated structure, though fairly tepid where attempted,[262] holds conceptual promise. Often the systems address important, but mainly procedural or low level substantive matters.[263] Unions and employers bargain in a limited way over supplementation to background laws.[264] But what if unions approached the bargaining with restitutionary purpose? As commonly allowed,

> The most significant features [of this supplementation] contain an alternative dispute resolution system (which in most contracts includes a three stage process involving an ombudsman, mediation, and arbitration) and the use of a limited list of physicians which may be the exclusive or partial source of all medical treatment and evaluation as selected collectively by the union and employer, but not the

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[256] Michael C. Duff, *Can Workers' Compensation "Work" in a Mega-Risk World: The COVID-19 Experiment*, 35 ABA J. OF LAB. & EMP. LAW 1 (2020) (The Covid-19 experiment reveals that state workers' compensation systems may be poor remedial vehicles for large-scale mega-risks to which employees and the general public are equally exposed. Future pandemics and climate-change events may generate similar problems).

[257] *Id*.

[258] *See supra*. n.8 and accompanying text.

[259] *See supra*. n.16 and accompanying text.

[260] *See* Kuciemba v. Victory Woodworks, Inc. (Case No. S274191) (Ca. 2023).

[261] David B. Torrey, *The Opt-Out of Workers' Compensation Legislation*, 52 ABA TORT, TRIAL & INSURANCE L. J. 39, 42 n.13 (2016) ("The term 'carve-out' is shorthand for the process by which management and union agree in a collective bargaining agreement (CBA) to maintain their own medical delivery and dispute resolution process for work injuries.).

[262] *See* David I. Levine, Frank W. Neuhauser, Richard Reuben, Jeffrey S. Peterson, Cristian Echeverria, *"Carve-Outs" from the Workers' Compensation System*, 21 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 463 (2002).

[263] In the garden variety workers' compensation case there may be relatively straightforward but disputed coverage, benefit calculation, and return to work issues.

[264] Moscowitz & Van Bourg, *Carve-Outs and the Privatization of Workers' Compensation in Collective Bargaining Agreements*, 46 SYRACUSE L. REV. 1, 3 (1995).

> individual injured worker.' In other words, the legislation is aimed at the medical delivery system and the prevention and resolution of disputes.[265]

But as Levine et al. noted when analyzing California's carve out system in 2002,

> Carve-outs were designed to deal with delivery of medical and indemnity benefits on workers' compensation claims and the settlement of disputes over these benefits. However, many workers' compensation claims—particularly the most serious—can involve other issues. This blurred boundary of "the" workers' compensation system highlights the challenges of negotiating alternatives to state regulation. For example, wrongful termination after an injury, claims of serious and willful violations of safety protections, and claims against third parties can be problematic within the structure of a carve-out. Substantial penalties are applied for these violations that cannot, by statute, be indemnified through workers' compensation insurance.[266]

The curious aspect of discussion on the "blurred boundaries," when trying to negotiate alternatives to state regulation, is an apparent embedded assumption that a negotiated agreement must comply with state law. Assuming, however, that the state can set the floor of regulation,[267] it does not follow that it can unilaterally set the ceiling.[268] There is nothing preventing parties from negotiating "wrongful termination after an injury, claims of serious and willful violations of safety protections, and claims against third parties can be problematic within the structure of a carve-out,"[269] or any other aspect of a state workers' compensation system the parties may wish to bargain. Indeed, an employer would almost certainly be required to bargain over any such matters if requested to do so by a union—even major issues like paying injured workers one-hundred percent of their pre-injury wage or paying work injury benefits for a longer time than permitted under state law.[270] There are also no cases holding that alternative workers' compensation is somehow an illegal subject of bargaining.[271] As the Supreme Court observed nearly four decades ago, parties may bargain to alter state law through collective bargaining, even though the

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[265] *Id*. at 3.

[266] *See* Levine, et al., *"Carve-Outs" from the Workers' Compensation System, supra.* n.262 at 474.

[267] Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 7 (1987) ("Maine's severance payment law is a valid and unexceptional exercise of the [State's] police power.'")

[268] In re National Football League Players' Concussion Injury Litigation, No. 2:12-md-02323-AB MDL No. 2323, slip op. at 7, April 15, 2015) (discussing that work injury claims brought under state law are typically preempted under § 301 of the LMRA if the claims implicate provisions of a collective bargaining agreement). In the present context the litigation is important because it demonstrates the widespread nature of collective bargaining treatment of workplace injury. Under workers' compensation law there are significant barriers to "cumulative" brain injury and players' unions have had to resort to "contractualization" of such injuries. Mason Storm Byrd, *Concussions and Contracts: Can Concern Over Long-Term Player Health Pave the Way to Greater Guarantees in NFL Contracts?*, 59 ARIZ. L. REV. 511 (2017) (discussing attempts to improve player compensation contractually in reaction to under compensation for severe but latent injury); Matthew Friede, *Comment: Professional Athletes Are "Seeing Stars": How Athletes Are "Knocked-Out" Of States' Workers' Compensation Systems*, 38 Hamline L. Rev. 519 (2015) (discussing workers' compensation coverage issues).

[269] *See supra.* n.266 an accompanying text.

[270] *See supra*. n.238 and accompanying text.

[271] "Illegal subjects of bargaining are those which are unlawful or inconsistent with the basic policy of the Act." Eddy Potash, Inc., 331 NLRB 552, 559 (2000).

background state law is not automatically preempted by federal labor law.[272] While a state's establishment of minimum substantive labor standards does not undercut collective bargaining, a prohibition on collective bargaining over private improvements to state standards would.

> *Absent a collective-bargaining agreement,* for instance, state common law generally permits an employer to run the workplace as it wishes. The employer enjoys this authority without having to bargain for it. The parties may enter negotiations designed to alter this state of affairs, but, if impasse is reached, the employer may rely on pre-existing state law to justify its authority to make employment decisions; that same state law defines the rights and duties of employees. Similarly, Maine provides that employer and employees may negotiate with the intention of establishing severance pay terms. If impasse is reached, however, pre-existing state law determines the right of employees to a certain level of severance pay and the duty of the employer to provide it.[273]

Because workers' compensation is, broadly, a mandatory subject of bargaining there is no reason to think that any portion of its operation is not. Originally, mainly construction industry unions may have been interested in workers' compensation bargaining carve-outs to improve their position on relatively narrow (though important) intra-system issues like physician selection, or in exploration of joint labor-management interest in a procedurally more efficient system.[274] But as statutory benefits have become so much worse substantively,[275] such parsimonious bargaining seems harder to justify. In sum, there is no reason that strong unions could not push more broadly and aggressively for much better workers' compensation.

It is true, of course, that labor-management bargaining cannot directly compel state legislatures to alter workers' compensation (or other state law remedies) in ways that would be beneficial to workers; though the establishment of causation presumptions demonstrates that broader worker-protective political pressure is possible. Workers proceeding with bargaining zeal propelled by a restitutionary spirit have significant legal tools at their disposal to impact the injury remedial and safety landscape. The prospect of bargaining over the rectification of a constitutional wrong could become a powerful rallying cry. Essential questions like, "is it any longer justifiable to limit workers' compensation remedies to two-thirds of the pre-injury average weekly wage?"; "why is a permanently partially disabled worker paid a small lump sum bearing no relationship to wages lost through injury?"; "why is a permanently disabled worker limited to $155,000 total in worker' compensation benefits, even if they have lost four decades of career earning capacity?"; "why does our bargaining unit have no idea how much of an injured workers' wages is recovered

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[272] *See* Malone v. White Corp,, 435 U.S. 497, 504-505 (1978) ("There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper subjects of compulsory bargaining. But there is nothing in the NLRA, including those sections on which appellee relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, *that may be the subject of collective bargaining*). (Emphasis supplied).

[273] Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 *supra*. n.267 at 21. (Emphasis supplied). The corollary is that *in the presence of* a collective bargaining agreement state law does not permit an employer to operate a workplace in strict accord with state law.

[274] Levine et al., *"Carve-Outs" from the Workers' Compensation System*, *supra*. n.262 at 468-469 (discussing early, limited cost-containment history of the carve-outs in the construction industry, especially in California).

[275] Duff, *Fifty More Years of Ineffable Quo*, *supra*. n.2 at 8 (arguing that workers' compensation concedes injured worker destitution).

after a work related injury?;" are all potentially the subjects of mandatory collective bargaining in a unionized environment that could be addressed substantively in a carve-out agreement. Even if employers refuse ambitious proposals out of hand, the sweep of bargaining is increased, and the prospect for enhanced labor solidarity seems enormous. When it comes to workplace danger, perhaps we are all miners now. Unions could be hard about the business of bargaining for substantive compensation and safety rules.[276]

CONCLUSION

A "new bargain" on workplace safety and remedies for workplace injury and death is necessary given the ongoing specter of workplace harm. This bargain may be contractually negotiated by labor unions in unionized industries; or it may emerge as a series of "shock absorbers" in reaction to national emergencies like pandemics and extreme weather events. The new bargain should be struck in disregard of the fiction that workplace harm is necessarily accidental and thus damnum absque injuria.[277] This tale was built on a corruption of the constitution that simply will not continue to do. Work injuries are always foreseeable, either in the dyadic sense of a specific relationship between a particular employer and a particular employee; or because injuries are characteristic of the activity of employers—a reality that prodded employers to accept the original grand bargain in the first place. Tort law was coming, one way or another,[278] so states begrudgingly implemented workers' compensation. When a state shrinks workers' compensation remedies to a vanishing point, and demands that meager remedies will be the exclusive remedy of injured workers (whose fates are not thereafter tracked), a line has been crossed. The line is further descried by the sheer horror of over 100,000 untracked occupational disease deaths per year.[279] States have seized a tort remedy and drowned it in the bathtub. Workers are assured that the federal constitution has nothing to say about the matter. They may doubt the conclusion and sense the existence of "ink spot rights." They may squint at the ninth and fourteenth amendments. And they may see just enough to stay in the fight.

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[276] *See* COLLECTIVE BARGAINING FOR HEALTH AND SAFETY: A HANDBOOK FOR UNIONS, LABOR OCCUPATIONAL HEALTH PROGRAM, UNIVERSITY OF CALIFORNIA AT BERKELEY, SCHOOL OF PUBLIC HEALTH (2000) *available at* https://laborcenter.berkeley.edu/wp-content/uploads/2023/06/collective-bargaining-secure.pdf (providing several sample collective bargaining agreement health and safety provisions).

[277] "A loss for which the law provides no means of recovery." MERRIAM WEBSTER DICTIONARY ONLINE *available at* https://www.merriam-webster.com/legal/damnum%20absque%20injuria.

[278] Marland C. Hobbs, *Statutory Changes in Employers' Liability*, 2 HARV. L. REV. 212 (1888).

[279] AFL-CIO DEATH ON THE JOB (2022) available at https://aflcio.org/reports/death-job-toll-neglect-2022.